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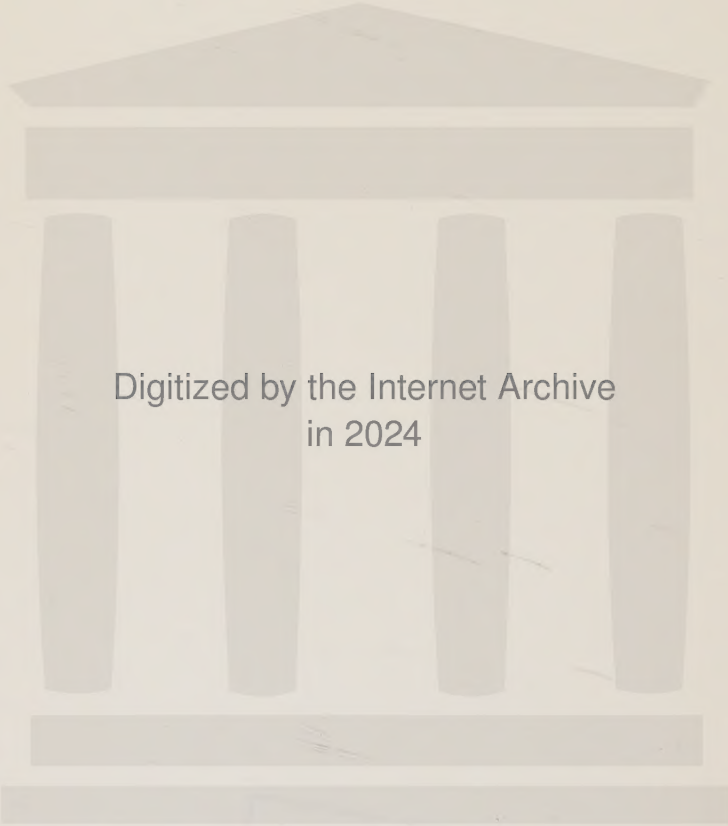
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1920.

THE LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

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King's Bench, Court of Criminal Appeal; Appeals from County Courts in Bankruptcy Cases, and Railway and Canal Commission Cases.	{ J. F. CLERK, F. O. ROBINSON, J. E. ALDOUS, J. S. HENDERSON, R. F. STUBBING, J. RITCHIE,	
Bankruptcy Cases	J. E. ALDOUS,	<i>Barrister-at-Law.</i>

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OF
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1920.

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THE HIGH COURT OF JUSTICE.

1920.

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ERRATA.

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223-235 delete "C. A." in sidenotes.			
421. In last two lines delete the words "was wrongly decided inasmuch as it."			

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 ON APPEAL THEREFROM
 AND BY THE
COURT OF CRIMINAL APPEAL
 AND BY THE
RAILWAY AND CANAL COMMISSION.

FELTON v. HEAL.

1920

Apr. 15, 16.

Mines—Regulations—Omission to do act “necessary for the safety . . . of the persons employed therein”—Omission of act in palliation of Consequences of Accident—“Person employed in or about the mine”—Manager—Limitation of Time for laying Information—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11—General Regulations dated July 10, 1913, made under Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), regs. 28, 149 (b)—Coal Mines Act, 1914 (4 & 5 Geo. 5, c. 22), s. 2.

By Regulation 28 of the General Regulations dated July 10, 1913, made under s. 86 of the Coal Mines Act, 1911: “No person employed in or about the mine shall negligently . . . omit to do anything necessary for the safety . . . of the persons employed therein.” The respondent, the manager of the mine, omitted to give instructions to the person left in charge in his absence as to where to find a key which would give him access to a telephone in the mine communicating with a rescue station outside, with the alleged result that a person employed in the mine who had met with an accident therein, died through delay in tending his injuries:—

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Held, that the respondent was a "person employed in or about the mine" within the meaning of the regulation, and that its operation was not confined to the omission to do acts for the prevention of accidents but extended to the omission to do acts for the palliation of the results of accidents, and that the case must be remitted to the justices to be dealt with on that basis.

By Regulation 149: "There shall be provided . . . at every mine a suitably constructed ambulance carriage. This requirement shall not apply . . . (b) to any mine at which the total number of employees is less than 500, if the owner, agent or manager has acquired the privilege of obtaining the use of such a conveyance when required from a central rescue station . . . in telephonic communication with the mine":—

Held, where the other conditions specified existed, that in the circumstances set out above the rescue station was in telephonic communication with the mine, and that the respondent was not guilty of not providing an ambulance carriage under the regulation.

By s. 2 of the Coal Mines Act, 1914, summary proceedings against any person for non-compliance with any of the provisions of the regulations made under the Coal Mines Act, 1911, may be commenced at any time within three months after the making of a report on an accident in the mine or the conclusion of an inquest held in consequence of an accident therein:—

Held, that this provision was an extension of and not in substitution for the provision of s. 11 of the Summary Jurisdiction Act, 1848, which provides that such proceedings shall be commenced within six months from the commission of the offence, and that, consequently, informations preferred more than three months after the conclusion of the inquest on the above-mentioned employee, but less than six months after the commission of the offences charged, were not out of time.

Case stated by Somersetshire Justices.

At a court of petty sessions sitting at Temple Cloud in the county of Somerset an information was on July 21, 1919, preferred by the appellant, John Robinson Felton, an inspector of mines, against the respondent, Charles Heal, for that the respondent, on March 28, 1919, at Paulton, in the said county, being the manager of a mine within the meaning of the Coal Mines Act, 1911, unlawfully was guilty of an offence against Regulation 28 of the General Regulations dated July 10, 1913 (1), made under the above Act, in that he had negligently

(1) General Regulations, dated July 10, 1913 [1913 No. 748]. Regulation 28: "No person employed in or about the mine shall negligently or wilfully do anything likely to endanger life or limb in the mine,

or negligently or wilfully omit to do anything necessary for the safety of the mine or of the persons employed therein."

Regulation 149: "There shall be provided and kept in good condition

omitted to do a certain thing necessary for the safety of the persons employed in the mine—namely, negligently omitted to give one Henry Starr, an examiner employed at the colliery, the instructions necessary in case of accident at the said colliery or the means of communicating with the rescue station in respect of such accident.

At the same time and place a second information was preferred by the appellant against the respondent for that the respondent on March 29, 1919, at Paulton aforesaid, being the manager of a mine within the meaning of the Coal Mines Act, 1911, was guilty of an offence under Regulation 149 of the General Regulations in that he did not provide and keep in good condition at the mine a suitably constructed ambulance carriage. The two informations were heard together.

At the hearing the following facts were proved or admitted.

The respondent was the manager of a coal mine, the Old Mills Colliery, to which the Coal Mines Act, 1911, applies. At about 1.30 A.M. on March 29, 1919, an incline hitcher named Frank Davis was assisting a dipple rider named William Mitchell to bring a train of loaded tubs up the Bottom Vein Dipple, and while doing so was caught and crushed between the last two tubs in the train, and sustained serious injuries. The person in charge of the Bottom Vein Dipple on the night of March 28–29 was one Harry Starr, an examiner. Mitchell reported the accident to Starr, who assisted Mitchell to bring Davis to the surface. For the reasons hereinafter appearing no ambulance was provided at the colliery, and Davis was conveyed in a snowstorm in an open cart to the Paulton Hospital, about half a mile from the pit head, but was not admitted. He was thereupon conveyed to his home at

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at every mine a suitably constructed ambulance carriage. This requirement shall not apply . . . (b) To any mine at which the total number of employees is less than 500, if the owner, agent or manager has acquired the privilege of obtaining the use

of such a conveyance when required from a central rescue station, hospital or other place, distant not more than ten miles from the mine, and in telephonic communication with the mine."

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Midsomer Norton, but later on was removed to the Paulton Hospital, and died there soon afterwards.

The number of employees at the colliery was less than 500, and the owners had acquired the privilege of obtaining the use of a suitably constructed ambulance carriage from the central rescue station at Midsomer Norton within the meaning of Regulation 149(b) of the General Regulations (1), which was situated about two miles from the colliery. A telephone, by means of which the central rescue station could be communicated with, was installed at the colliery in a room below the manager's office. This room was usually kept locked at night and was so locked up on the night in question, but the key of the room door was hanging in the lobby of the manager's office, where it was usually kept, which office was not locked up. Harry Starr did not know that the room in which the telephone was kept was locked up, and did not know where the key was kept. He had received no instructions as to the use of the telephone, or as to the obtaining the ambulance from the rescue station. He had been supplied with a copy of the said General Regulations, and was aware that it was his duty under Regulation 59 to report to a superior official all accidents, dangerous occurrences or defects which might come to his knowledge. He reported this accident to the under-manager at 12.30 P.M. on March 29, after Davis had died. His explanation (which the justices accepted) why he did not summon the under-manager or overman when he first heard of the accident, or report the matter earlier, was that he did not think that Davis was seriously hurt but was more frightened than hurt. The under-manager and overman reside within a few yards of the pit, and were available at the time of the accident. It was not alleged that Starr had committed any offence.

No special report was made by an inspector with respect to or in consequence of the accident, but two reports—a verbal report on March 31, and a report in writing on April 12, 1919, were made by Elijah Rowley, an inspector of mines for the district, to the appellant, as senior inspector for the district. These reports were made on an investigation made

by Elijah Rowley at the colliery on March 31. An inquest on the body of Davis was held, and was concluded on April 2, 1919.

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No evidence was given by the respondent before the justices, and no witnesses were called on his behalf. The justices were of opinion that the manager of a mine is a "person employed in or about the mine" within Regulation 28. That Regulation 28 does not extend to acts committed or omitted in the care or treatment of persons after they have been injured by an accident. That under s. 2 of the Coal Mines Act, 1914, which enacts that where in consequence of any accident in a mine a coroner's inquest is held and it appears from the proceedings at the inquest that any of the provisions of the Coal Mines Act, 1911, or the Orders or Regulations made thereunder, were not being complied with at the time of the accident, summary proceedings in respect thereof may be commenced within three months after the conclusion of the inquest that proceedings must be commenced within three months of the conclusion of the inquest, and that the period of six months from the offence, within which proceedings must be taken under s. 11 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), does not apply.

The justices therefore dismissed both informations, but stated this case.

G. A. H. Branson and Wethered for the appellant. The decision of the justices that the informations were out of time was wrong. Sect. 2 of the Coal Mines Act, 1914, which enacts that proceedings may be commenced "at any time within three months after the making of the report or the conclusion of the inquest" is not a restrictive but an enabling section. It was enacted in contemplation of a prolonged inquiry into an accident at the mine, not concluding until after more than six months after the commission of the offence, and it gives this further period in such a case. In *Boydell v. Levant Mine Adventurers* (1) it was held with respect to

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the provision in s. 146, sub-s. 1, of the Factory and Workshops Act, 1901, that an information in relation to an offence under that Act must be laid within three months after the date of the offence coming to the knowledge of the inspector, or, if an inquest was held, within two months after its conclusion, that the latter provision did not cut down the former period, but was an extension of it.

Regulation 28 not only applies to precautions intended to prevent accident, but also to measures taken to palliate the results of accident. For instance it is equally necessary for the safety of persons employed in a mine to take steps for the localization of the effects of an explosion, as to take steps to prevent an explosion. Many injuries which would be serious if not immediately treated are trivial if tended at once, and provisions dealing with proceedings to be taken after and in consequence of accidents are "necessary for the safety . . . of the persons employed."

Foots K.C. and *Croom-Johnson* for the respondent. These informations were out of time, whether the date from which the time be calculated be that of the making of the report or that of the conclusion of the inquest itself. Sect. 2 of the Coal Mines Act, 1914, is in substitution for s. 11 of the Summary Jurisdiction Act, 1848, which limits the time to six months from the commission of the offence. The reason for the shorter period being substituted is that after a public inquiry there is no necessity for the longer period in which to pursue investigations.

The operation of these regulations, which are concerned with the safety of the mine and of those employed therein, should be confined to the carrying out of the provisions of Part II. of the Coal Mines Act, 1911, which is headed "Provisions as to safety." All the provisions of Part II. deal with measures to be taken for the prevention of accidents. Provisions as to accidents which have taken place, as contrasted with provisions for preventing accidents, are contained in Part IV. of the Act headed "Provisions as to accidents."

Regulation 28 does not apply to a manager, who is not a

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"person employed in or about the mine." Throughout the Act of 1911 a distinction is drawn between the manager and the employees—e.g., sects. 8, 16, 18, 86, 88, 103 and 106—and, unless Regulation 28 be an exception, there is no other section of the Act or regulation in which "manager" can be shown to be included in the words "person employed in the mine."

There was no evidence to support the charge under Regulation 149 of not providing an ambulance. The case was put by the appellants in this way. They said that as the telephone, the means of communicating with a place whence an ambulance would come, was in a locked room, and that the respondent had not informed the foreman as to where the key of the room was kept, he had not provided an ambulance. But the charge must mean that he had not provided it on the day preceding this night, for it cannot have been contemplated by the regulation that he should provide it suddenly at two o'clock in the morning; and during the preceding day the door of the telephone room was not locked. Moreover, this being a mine in which the total number of employees was less than 500, Regulation 149, by sub-clause (b), does not apply.

Branson in reply. Regulation 149 only operates to exempt from the provisions of the regulation if (inter alia) the rescue station is in telephonic communication with the mine. At the time of the accident the station and the mine were not, in effect, in telephonic communication. It is not correct to say that these regulations should be restricted to the carrying out of the provisions of Part II. of the Act, for in fact, some of them deal with matters outside Part II. and relate to measures to be taken after an accident has happened—e.g., Regulations 29 and 59, which deal with reports when an accident has happened.

Regulation 28 applies to a manager.

He was stopped.

EARL OF READING C.J. The appellant appeals from a decision of justices dismissing two informations preferred by him against the respondent, who was the manager of

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a coal mine within the meaning of the Coal Mines Act, 1911. The informations alleged that the respondent had been guilty of a breach of Regulation 28 of the General Regulations dated July 10, 1913, made under s. 86 of the Act, and also, as an alternative, of Regulation 149. When the matter came before the justices the facts, so far as material, were that the respondent having left the mine at 1.30 A.M. on March 29, 1919, an incline hitcher named Frank Davis was assisting in moving a train of loaded tubs, and, while so engaged, sustained serious injuries. At that time there was a man in charge named Harry Starr, an examiner. The latter helped to bring Davis to the surface, but failed to report the accident, as he should have done, to the under-manager, who was residing close to the pit, and no step was taken to use the telephone, although it had been arranged that on receipt of a telephone call an ambulance should be sent, and Davis could then have been removed to hospital. He was not in fact taken to hospital until some time after, and unfortunately was at first refused admission, and, though eventually admitted, he died.

In these circumstances it is said that there has been negligence on the part of the respondent, inasmuch as he had neglected to do something necessary for the safety of the persons employed in the mine within the meaning of Regulation 28. The justices, in the first place, looking at the dates, and giving the construction to the Act of Parliament which they thought right, came to the conclusion, in point of fact, that these summonses were both out of time, and therefore that the appellant failed on that ground, and the first question is whether the justices were right in this view. In my opinion they were wrong. They proceeded under the impression that s. 2 of the Coal Mines Act, 1914, repealed s. 103 of the Coal Mines Act, 1911, which brought into operation the Summary Jurisdiction Acts, and consequently limited the time within which the summonses might be issued to six months, as provided by s. 11 of the Summary Jurisdiction Act, 1848. The justices came to the conclusion that s. 2 of the Act of 1914 was intended to cut

down and limit the operation of s. 11 of the Act of 1848. I think that was a mistake. Sect. 2 of the Act of 1914 was passed for the purpose of extending the time for taking proceedings, inasmuch as it is well known that an inquest or report upon an accident in a coal mine may last for some considerable time, even longer than six months. There are inquiries of a technical and expert character to be made, and time may elapse before the experts can actually get to the place where the accident took place. But whatever may be the reason for the enactment I think that the words of s. 2 are of an enabling and not of a restrictive character, and that it was intended that not only should the Summary Jurisdiction Act, 1848, apply, but that additional time should be given in a proper and necessary case. I think that the case of *Boydell v. Levant Mine Adventurers* (1) really covers the precise point.

The next point is that the justices have wrongly construed Regulation 28 of the General Regulations of 1913. As to that regulation, it is said on behalf of the appellant that the decision of the justices that it does not extend to an act committed or omitted after and in consequence of an accident is wrong, and that the words should be construed as having a wider effect. Now the conclusion at which I have arrived is that the justices have wrongly limited the application of this regulation, and I do not think it right to say that it does not extend to acts omitted or committed after an accident. The true view is that the regulation may extend to such acts; it may extend to the omission or commission of acts for securing safety by way of minimizing the consequences of accidents, as well as with a view of preventing their occurrence. It is not intended that the operation of the words in Regulation 28 "safety . . . of the persons employed therein" should stop at the narrower interpretation, as apparently the justices have thought. I can find nothing in the context or in the whole of the regulations which suggests that there must be that limitation. It may be very necessary within the purview of these regulations

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that the person who has suffered the accident should be taken from the mine at once, possibly in order to prevent further ill consequences to him, and when the regulation is that no person shall neglect to do anything necessary for the safety of persons employed in the mine, to my mind it is clear that there is no intention to limit the operation of these words to the neglect to take steps for the prevention of accidents. Primarily, no doubt, what was in the minds of the framers of these regulations was the prevention of accidents, but they were also intended to prevent the recurrence of accidents, and the words of Regulation 28 are therefore wider in order to cover the consequences in the way I have stated.

The other question is whether the words "No person employed in or about the mine" in Regulation 28 include the manager. The justices came to the conclusion that the manager was a person so employed within the meaning of the regulation, and I agree with that view. Looking at the words in their ordinary and natural interpretation it can scarcely be said that a manager is not so employed. His very occupation makes us think that he is, for it is he who manages the mine. I see no reason for distinguishing between him and an under-manager or an overman. The argument pressed upon us, worthy of careful consideration, is that bearing in mind the Act of Parliament and the scope of these regulations we ought to come to the conclusion that when it is intended to include the manager he is included by name, but that one never finds the words "person employed" used where it is intended to include the manager, except, of course, in Regulation 28, if we so hold. I agree that both in the Act and in the regulations these words are used where they do not include the manager, and that in some cases it was obviously intended to draw a distinction between a manager and the persons employed in the mine—e.g., Regulation 38. But I find on going through the regulations that the language varies considerably. The word "person" is used without limitation, and that would include anyone, whether employed about the mine or not. The term

used of the next widest import after "person" is "person employed in or about the mine." I have already stated that in my opinion, looking at the words in their ordinary and natural interpretation, they would include a manager. Then there are regulations in which the manager is named individually, and in such regulations it is obvious that it is intended to draw a distinction. If there is any doubt about this, s. 101 of the Act bears the distinction upon its face, and shows what is intended by the use of the words "employed in or about the mine," because the following words are "other than an owner, agent, or manager." If these latter words had not been inserted it seems to me clear that it was contemplated that a manager would have been included in the former words. But in any event, apart from that section, the language used in Regulation 28 is wide enough to include a manager. I think that the object was to impose a general obligation on the manager, and that where it was desired to impose obligations on him in addition to those imposed on him as an employee there was a special regulation—e.g., Regulation 38. Therefore, on these grounds, I am of opinion that the justices were right on this point.

The only question left is that arising on Regulation 149. What is said is that there has been no inquiry by the justices on the charge under this regulation, and no finding by them, and this seems to be the case. But the facts as found are beyond controversy. Counsel for the respondent says that even if we come to the conclusion that the justices were wrong as to the point of time, we ought not to send the case back on the point under this regulation, because on the face of it the offence charged has not been committed. I agree. The charge against the respondent was that he did not provide and keep in good condition a suitably constructed ambulance. Regulation 149 imposes this obligation generally save in certain cases, and in sub-clause (b) sets out that this requirement shall not apply to any mine at which the total number of employees is less than five hundred, if the owner, agent, or manager has acquired the privilege of obtaining the use of such a conveyance, when required, from a central

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rescue station, etc. The mine in question was a mine of this character, and the manager had acquired the above privilege, and the other condition as to the distance of the rescue station, mentioned in sub-clause (b), existed. And I think the station was in telephonic communication with the mine, apart from the particular circumstances of this night. There was a telephone in an office in the mine, and the only reason why it was not used on this occasion was because no instructions had been given to Starr as to where the key of the office was in which the telephone was kept. But even had he known where to find the key it is clear that he would never have put himself into telephonic communication with the rescue station, for he thought the accident a trivial one. But as I have said, I think that in the circumstances of this case it cannot be said that the rescue station was not in telephonic communication with the mine. I do not say that if this had been a broken-down telephone, and had been left in that condition for some time, the case would have been the same. I think, in these circumstances, that it would be useless to remit the case to the justices on this point. But on the point under Regulation 28 the case must be remitted. Of course we are not dealing at all with the facts which are for the justices to deal with.

AVORY J. I agree with the judgment of my Lord on all the points that have been argued.

ROCHE J. I agree.

Appeal allowed and case remitted.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondent: *Calder Woods & Pethick for Wansbroughs, Robinson, Tayler & Taylor, Bristol.*

W. L. L. B.

ASTOR v. BARRETT AND HULME.

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May 7.

County Court—Practice—Trial before County Court Judge alone—Misdirection—Jurisdiction of County Court Judge to grant New Trial—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 93.

Where a county court judge has heard a case when sitting without a jury and has given his decision thereon he cannot subsequently grant a new trial because he is of opinion that he has made a mistake upon a question of law.

APPEAL from Blackpool County Court.

The defendant, Mrs. Barrett, in March, 1919, let a furnished house to the plaintiff for a year. Wishing to get rid of the plaintiff as tenant, she in November, 1919, instructed the defendant Hulme to go to the plaintiff's house and to get rid of him and his family. She said that he had better take two men with him. Hulme accordingly went to the plaintiff's house with two men on November 22, 1919, and after entering the house pretended that he was the head bailiff from the police court, and that he had an ejectment order from the magistrate authorizing him to forcibly eject the plaintiff. No ejectment order had in fact been applied for or obtained against the plaintiff.

The plaintiff brought an action in the county court claiming 50*l.* damages against both defendants for the trespass; alternatively he claimed damages against the defendant Hulme for the trespass. At the hearing on January 28, 1920, it was admitted by counsel for Mrs. Barrett that she was responsible for the initial illegal entry and trespass by Hulme, but it was contended that she was not responsible for the fraudulent pretence by Hulme that he was the head bailiff from the police court and in possession of a warrant of ejectment authorizing him to forcibly eject the plaintiff, nor was she responsible for the other indignities and trespasses committed by Hulme. It was contended that these were separate and independent trespasses for which the defendant Hulme was alone responsible.

The county court judge accepted that contention, and gave

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judgment for 20*l.* against the defendant Mrs. Barrett, and 50*l.* against the defendant Hulme. The plaintiff's solicitor said that in law the damages could not be so divided, and asked for leave to amend by claiming 70*l.* against both defendants. The county court judge replied that he had given his judgment and could not alter it, but that he was willing to make any amendment that was legal or possible to put the matter right if he had made a mistake in apportioning the damages, and he asked the parties to draw up minutes of his judgment.

As the parties could not agree as to the meaning and legality of the judgment with regard to apportioning the damages, the matter came before the county court judge again on March 10, when the plaintiff's solicitor contended that on the authorities the county court judge had misdirected himself in law in apportioning the damages, and that both defendants were in law equally responsible for all and each of the trespasses committed, and he applied for a new trial.

The county court judge held that he had misdirected himself in law in accepting the contention of Mrs. Barrett's counsel and in apportioning the damages, and he accordingly granted the application for a new trial.

The defendant Mrs. Barrett appealed.

C. M. Pitman for the defendant Mrs. Barrett. The county court judge having heard and decided the case sitting without a jury had no jurisdiction to set aside his judgment and to order a new trial on the ground that he had made a mistake in law. Under s. 93 of the County Court Act, 1888, every judgment of a county court is final and conclusive between the parties, but the county court judge has in every case power to order a new trial. It was held in *Murtagh v. Barry* (1) and in *Brown v. Dean* (2) that that is not an absolute power to be exercised upon any ground which the judge may think fit, but only on the grounds on which a new trial may be granted in the High Court. Lord Loreburn in *Brown v. Dean* (2) laid stress upon the point that it was intended by the Legislature that the judgment of a county court judge should be final.

(1) [1890] 24 Q. B. D. 632.

(2) [1910] A. C. 373.

It was held in *Clarke v. West Ham Corporation* (1) that a county court judge who has ruled that there is evidence for the jury and has entered judgment for the plaintiff in accordance with the verdict has no power to grant a new trial on the ground that there is no evidence for the jury. In that case Lush J. said that "a county court judge having once finally adjudicated upon the matters in dispute between the parties, and having entered judgment for one of them, has no power subsequently to set aside his own judgment and enter a different judgment"; and later he said that "a county court judge has no power to set aside his judgment and to grant a new trial if it is asked for on the ground that there was no evidence to go to the jury, because to do so would involve the reversal by him of his own previous decision given on that question of law." Atkin J. also said: "In my opinion the county court judge had no jurisdiction to grant a new trial upon a ground which is not really a ground for a new trial at all, but is a ground for altering or setting aside the final adjudication upon the case which the county court judge had already arrived at when he directed that judgment should be entered for the plaintiff upon the verdict of the jury." Those observations are directly in point in the present case. In *Sanatorium, Ltd. v. Marshall* (2) the Divisional Court held that where a county court judge came to the conclusion that he had at a trial without a jury misdirected himself he had jurisdiction to order a new trial. There, however, the question as to which the judge had misdirected himself was purely one of fact, whereas in the present case the misdirection was as to a point of law. *Clarke v. West Ham Corporation* (3) was referred to by Sankey J. in delivering the judgment of the Court, as being a binding authority.

[SALTER J. Would not the Court of Appeal have power to grant a new trial upon the facts of the present case?]

The Court of Appeal, as all the facts had been proved, would not have granted a new trial, but would have entered judgment for the appellant. It was however decided in *Robinson v.*

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(1) [1914] 2 K. B. 448, 451, 454.

(2) [1916] 2 K. B. 57.

(3) [1914] 2 K. B. 448.

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Fawcett (1) that a county court judge has no jurisdiction on an application for a new trial to enter judgment for the applicant.

H. H. Joy for the plaintiff. The Court of Appeal would grant a new trial on the ground of misdirection where otherwise there would be a miscarriage of justice. If no new trial is granted in the present case there will be a difficulty in enforcing the judgment of the county court judge, inasmuch as in an action against joint tort feors each of the tort feors is liable for the whole damage, and there cannot be separate assessments of damage against each of them : see *Greenlands, Ltd. v. Wilmshurst* (2) ; *London Association for Protection of Trade v. Greenlands, Ltd.* (3) The House of Lords held in *Brown v. Dean* (4) that the power of a county court judge in granting a new trial under s. 93 of the Act of 1888 is the same as the power of the High Court as regards granting a new trial. No judgment has ever been drawn up. Jessel M.R. pointed out in *In re Nazaire Co.* (5) that a judge can always reconsider his decision until the order has been drawn up.

[SHEARMAN J. A Chancery judge had power to alter his judgment before it was drawn up, but has a county court judge that right ?]

In *Moxon v. London Tramways Co.* (6) it was held that a county court judge who at the trial of an action with a jury had refused to grant a new trial, but who gives leave to the applicant to make another application, is not functus officio so as to prevent him hearing a second application and granting a new trial. In *Robinson v. Fawcett* (1) the trial had taken place before the county court judge without a jury, and it was held by the Divisional Court that the county court judge ought not to have set aside his judgment for the plaintiff and entered judgment for the defendants, but to have ordered a new trial. It is clear from the decision in *Sanatorium Ltd. v. Marshall* (7) and the dictum of Lord Parker of Waddington

(1) [1901] 2 K. B. 325.

(4) [1910] A. C. 373.

(2) [1913] 3 K. B. 507, 530.

(5) (1879) 12 Ch. D. 88, 91.

(3) [1916] 2 A. C. 15, 31, 40.

(6) (1888) 57 L. J. (Q. B.) 446.

(7) [1916] 2 K. B. 57.

in *Barry v. Minturn* (1) that a county court judge has power to direct a new trial if he has misdirected himself. It is immaterial whether a county court judge has made a mistake upon a question of fact or upon a point of law; in either case he has power to grant a new trial.

In *Lister v. Wood* (2) it was held that a county court judge who had struck a case out for want of jurisdiction, but who had subsequently come to the opinion that his decision was erroneous, had power to order a new trial. That was a mistake upon a question of law. The words of s. 93 of the Act of 1888 are quite clear that the judge shall in every case whatever have the power to order a new trial. The decision in *Clarke v. West Ham Corporation* (3)—namely, that a county court judge, when he has decided that there is a case to go to the jury and has entered judgment for the plaintiff in accordance with the verdict, cannot grant a new trial upon the ground that there was no case to go to the jury—was correct, because, as was pointed out by Sankey J. in *Sanatorium Ld. v. Marshall* (4), the proper remedy in such circumstances is to enter judgment for the defendant, and that a county court judge has no power to do. The observations however of Lush J. and Atkin J. in *Clarke v. West Ham Corporation* (5) which are relied upon by the other side, were merely obiter, and ought not to be followed.

[SHEARMAN J. referred to *How v. London and North Western Ry. Co.* (6)]

SHEARMAN J. In my opinion this is an important case. The county court judge from whose judgment this appeal is brought heard a case against two persons who prima facie were joint tortfeasors. He came to the conclusion that the two defendants were not joint tortfeasors but separate tortfeasors, and he gave judgment against the defendant Mrs. Barrett for 20*l.* and a separate judgment against the defendant Hulme for 50*l.* As the amount claimed by the plaintiff against both defendants was only 50*l.*, a question arose as to whether there

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(1) [1913] A. C. 584, 594.

(2) (1889) 23 Q. B. D. 229.

(3) [1914] 2 K. B. 448.

(4) [1914] 2 K. B. 448.

(5) [1914] 2 K. B. 451, 454.

(6) [1891] 2 Q. B. 496.

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should be an amendment, and it was contended that the damages could not be divided. The county court judge said that he had given his judgment and could not alter it, and he suggested that the parties should draw up minutes of his judgment. It is clear that he decided after hearing argument that the two defendants were separate tortfeasors; it may be that as to that he was not altogether wrong; it may be that although he ought to have given judgment against both defendants for 20*l.* he was right in giving judgment against Hulme alone for 50*l.* in respect of a separate and independent tort. The defendant Barrett against whom the judge had given judgment for 20*l.* did not know for a considerable time that there was any further difficulty about the case. It was subsequently pointed out to the judge that there was a difficulty with regard to drawing up the judgment, and that the defendants ought to be regarded as joint tortfeasors. The judge directed that the parties should be served with notice to appear before him, and after hearing further argument he got out of the difficulty by saying that he would set aside the judgment and order a new trial. No order had in fact been drawn up. It is however quite evident that the county court judge had arrived at a decision; he clearly treated himself as having given judgment against two separate tortfeasors, and granted a new trial because he entertained some doubt as to whether he had decided rightly.

It is said that the county court judge misdirected himself, and this appeal is based upon the ground that both on principle and on the decisions, when a county court judge has tried a case without a jury and has decided it, he has no power to grant a new trial upon the ground that he thinks he has made a mistake in law. It is said that the point is covered by s. 93 of the County Courts Act, 1888, which provides that "every judgment and order of the Court, except as in this Act provided, shall be final and conclusive between the parties. . . . The judge shall also in every case whatever have the power, if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay the proceedings." Those are important words. In the first place

it lays down emphatically that every judgment shall be final, and then it goes on to give power to order a new trial in every case. It has been decided that the power of a county court judge to order a new trial must be exercised judicially, and that the county court judge must act in the same way as the Court of Appeal when it grants a new trial, after a trial by a Court of first instance. It has been contended on behalf of the plaintiff that the meaning of the section is that, subject to any rules that may be made as to time, a county court judge can always treat himself as an appellate Court against any one of his own decisions. It is contended on the other hand on behalf of the defendant that the words at the commencement of the section, making the decision of the county court judge final and conclusive in every case, are the determining words, and that a county court judge cannot try a case a second time when sitting alone. He may grant a new trial if there has been a trial with a jury, but if he has heard a case and decided it when sitting alone he cannot rehear it. It is said that a county court judge cannot be in a higher position than a judge of the High Court, who has no power to reconsider his decision after giving judgment.

Sect. 120 of the County Courts Act, 1888, provides that "if any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the rules of the Supreme Court regulating the procedure on appeals from inferior Courts to the High Court." I do not however think that that section, although it gives a more extensive right of appeal than existed under the earlier Acts, has much bearing upon the point now before the Court.

We have been referred to a number of decisions. It seems to me that this point was considered by the Divisional Court in *Clarke v. West Ham Corporation* (1), though perhaps it was

(1) [1914] 2 K. B. 448, 451, 454.

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not necessary for the decision of that case. There Lush J. after reviewing the authorities laid down this principle: "A county court judge having once finally adjudicated upon the matters in dispute between the parties, and having entered judgment for one of them, has no power subsequently to set aside his own judgment and enter a different judgment." Atkin J. also said: "In my opinion the county court judge had no jurisdiction to grant a new trial upon a ground which is not really a ground for a new trial at all, but is a ground for altering or setting aside the final adjudication upon the case which the county court judge had already arrived at." These two judges after laying down the principle that a county court judge might grant a new trial if he had misdirected a jury, or on other grounds, such as the non-reception or the misreception of evidence, went on to lay down that the earlier part of s. 93 of the Act of 1888 was still important, and that a county court judge when he had tried a case and given his decision could not rehear it because he had made a mistake. In my opinion that decision was sound. I think the meaning of that decision is that where a county court judge has heard a case and directed judgment to be entered, the case has been determined and decided, and that he has no power if he has made a mistake to rehear the case. The party against whom judgment has been given must appeal to the appellate Court against his decision under s. 120.

The plaintiff strongly relied upon a decision of the Divisional Court in *Sanatorium, Ltd. v. Marshall* (1), where Lush and Sankey JJ. held that a county court judge could grant a new trial where he had misdirected himself with regard to a question of fact. It is very difficult to reconcile the reasons given in the judgment in that case with those given in *Clarke v. West Ham Corporation*. (2) The latter case was cited by Sankey J. in *Sanatorium, Ltd. v. Marshall* (1) as an authority for the proposition that a county court judge, when he has once decided that there is a case to go to the jury, cannot grant a new trial upon the ground that there was no case to go to the jury. No doubt however was cast in that case upon *Clarke v.*

(1) [1916] 2 K. B. 57.

(2) [1914] 2 K. B. 448.

West Ham Corporation (1), which has been regarded as an authority for some years. It seems to me that this Court ought not to disturb the plain terms of the judgment in that case, but ought to follow it. This appeal therefore must be allowed.

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SALTER J. If the point had been free from authority I should have thought that the county court judge had power to make the order for a new trial which he made. Sect. 93 of the County Courts Act, 1888, provides that a judgment and order of a county court judge shall be final and conclusive between the parties, but that is subject to a discretion given to the county court judge to order a new trial which is couched in language as wide as that used in the first part of the section. The power to order a new trial must be exercised on grounds which would justify an order for a new trial by a Court of Appeal. It has never been held that the power of a county court judge to order a new trial is not co-extensive with the power of this Court to order a new trial in the county court, and I see no reason why it should not be co-extensive. The plaintiff in this case had a substantial grievance owing to the error which the county court judge made; he had been deprived of the greater part of his right against the defendant Barrett, and I have no doubt that had the plaintiff made an application to this Court it would have ordered a new trial. I see no reason why the plaintiff should not obtain an order for a new trial from the county court judge in the same way as he would have obtained it from this Court, provided that the county court judge had the courage to admit his error in coming to his conclusion on a matter of law. There are however observations in the judgments in *Clarke v. West Ham Corporation* (2) to which my brother Shearman has already referred. The decision in that case was that a county court judge cannot order a new trial on the mere ground that there was no evidence for the jury in support of the plaintiff's case, after having previously ruled that there was evidence for the jury and after entering judgment

(1) [1914] 2 K. B. 448.

(2) [1914] 2 K. B. 451, 454.

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in accordance with the verdict of the jury. That decision is not questioned; but in so deciding certain important observations were made by the judges which were not strictly essential to their decision. I think however that it is impossible to suggest that those observations were not inconsistent with the course the county court judge took in this case. *Clarke v. West Ham Corporation* (1) was cited in the judgment of Sankey J. in *Sanatorium, Ltd. v. Marshall* (2) without any suggestion of dissent. I have myself some difficulty in reconciling the judgment in that case with the observations made in *Clarke v. West Ham Corporation*. (3) I agree that in these circumstances the best course is to allow the appeal and to give the plaintiff leave to appeal.

Appeal allowed.

Solicitors for plaintiff: *Indermaur & Brown for Callis & Woosnam, Blackpool.*

Solicitors for the defendant, Mrs. Barrett: *Oldman, Cornwall & Co., for T. Wylie Kay, Blackpool.*

(1) (1914) 2 K. B. 448.

(2) [1916] 2 K. B. 57.

(3) [1914] 2 K. B. 451, 454.

R. F. S.

LONDON GENERAL INSURANCE COMPANY LIMITED 1920
 v. GENERAL MARINE UNDERWRITERS' ASSOCIATION, LIMITED. May 11, 12.

[1920. L. 31.]

Shipping—Reinsurance on Cargo—Non-disclosure of material Facts—Contract of Reinsurance made after Loss—Liability of Underwriter—Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 6, sub-s. 1; s. 18, sub-ss. 1, 3; s. 19.

By s. 18, sub-s. 1, of the Marine Insurance Act, 1906, subject to the provisions of the section, the assured must disclose to the insurer before the contract is concluded every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which in the ordinary course of business ought to be known by him. If the assured fails to make the disclosure, the insurer may avoid the contract.

Sub-s. 3: "In the absence of inquiry the following circumstances need not be disclosed, namely . . . (b) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know."

Sect. 19 enacts (with regard to contracts of insurance effected by agents) that the agent must disclose to the insurer (a) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and (b) every material circumstance which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to the agent.

The plaintiffs insured (lost or not lost) the cargo of a steamship which was on a voyage from Italy to the United Kingdom. On the evening of the same day the ship put into port with her cargo on fire. On the next morning the casualty was posted at Lloyds' and about the same time a casualty slip containing the information was sent by Lloyds' to their subscribing underwriters, including the plaintiffs. The plaintiffs however did not read it, and before they knew of the casualty they, through their brokers, effected a reinsurance with the defendants, who were in the same state of ignorance. If the slip had been duly attended to, there were at least four and probably five hours in which the information as to the fire might have been communicated by the plaintiffs to the brokers.

The defendants refused to pay the plaintiffs under the policy of reinsurance on the ground that the plaintiffs ought to have known of the loss and disclosed it to the defendants before the contract of reinsurance was made. In an action on the policy of re-insurance :—

Held, that under s. 18, sub-ss. 1, 3 and s. 19, of the Act of 1906, the plaintiffs must be deemed to have known of the casualty at the time

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the contract of re-insurance was effected, and as they had ample time to communicate it to their brokers, they were either by themselves or their agents (notwithstanding that the defendants might have discovered the loss by looking at the casualty board or casualty slips) under an obligation to disclose it to the defendants, and that as they had not done so they were not entitled to recover on the policy.

ACTION in the Commercial List tried before Bailhache J.

The plaintiffs claimed for a loss under a policy of reinsurance on the cargo of a steamship, *Vigo*.

On September 24, 1918, the plaintiffs insured the cargo of the steamship *Vigo*, which was on a voyage from Italy to the United Kingdom. As the sum insured exceeded the limit the plaintiffs have on any one line they, about 4 o'clock on the afternoon of September 25, 1918, reinsured with the defendants. The head office of the plaintiffs is at Cleveland House, and their reinsurance department at Cornhill.

By the policy of reinsurance it was agreed and declared "that the said insurance shall be and is an insurance (lost or not lost), at and from any port or ports, place or places in any order or rotation in Italy to any port or ports, place or places in any order or rotation in the United Kingdom," and "that the subject matter of this policy as between the insured and the company so far as concerns this policy shall be and is as follows upon cargo. . . ."

The *Vigo* put in to Almira on the evening of September 24, 1918, with her cargo on fire. The fire in the *Vigo* was known at Lloyds' late on the night of September 24, 1918. It was posted on the casualty board on the morning of the 25th by 10 o'clock. A casualty slip containing that and other information was sent by Lloyds' to their subscribing underwriters, including the plaintiffs, at or about the same time. These slips are made and sent out as occasion requires during the day. A daily register or index of information is published and issued by Lloyds', but it only contains information received not later than 8 o'clock on the previous evening. At about 10 o'clock on the morning of the 25th the plaintiffs' brokers were instructed to effect a reinsurance policy at Lloyds'. This they did at about 4 o'clock that same afternoon. The

plaintiffs, although they had the casualty slip, did not read it, and did not in fact know of the casualty until some two days later. The defendants when they wrote the risk were in the same state of ignorance.

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The plaintiffs' methods of business were as follows: Their head office and their marine insurance office are in separate buildings. The marine insurance office sends daily bordereaux, as they are now called, to the head office, showing the results of the day's work. These are examined, and if they show that the plaintiffs have a heavier line upon a risk than they care to carry, the insurance office is instructed to reinsure. The plaintiffs have a limit of 1000% on any one line. They have several of the well-known automatic reinsurance treaties with other companies, and if any of these is available they simply reinsure under one or more of those treaties. If, as in the present case, none is available they reinsure, as was done here, in the ordinary way through brokers, at Lloyds'. The marine insurance office has three departments, for underwriting, for claims, and for reinsurance respectively. Instructions to reinsure are given direct by the head office to the reinsurance department, which was, at the time, under the charge of a Miss Stephens, acting when necessary under a Mr. Diaz, who was the brother and deputy of the plaintiffs' underwriter. The casualty slips were delivered to the underwriters' room. There was great pressure of business. The underwriters seldom or never looked at them. They were put into a drawer and from time to time during the day were taken to the claims department. What was there done with them did not appear.

The defendants refused to pay the plaintiffs under the policy of reinsurance upon the ground that the plaintiffs or their agents by whom the reinsurance was effected for the plaintiffs ought to have known of the loss and have disclosed it to the defendants before the contract of reinsurance was made. There was no suggestion of bad faith, and it was not suggested that the plaintiffs or any person responsible for the business in fact knew of the loss, although

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some individuals in the plaintiffs' office might have known of it.

Sect. 6 of the Marine Insurance Act, 1906, sub-s. 1: "The assured must be interested in the subject matter insured at the time of the loss though he need not be interested when the insurance is effected. Provided that where the subject matter is insured 'lost or not lost,' the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not."

Sect. 18, sub-s. 1: "Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract."

Sub-s. 3: "In the absence of inquiry the following circumstances need not be disclosed, namely . . . (b) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know."

Rule 1 of the Rules for Construction of Policy contained in the First Schedule to the Marine Insurance Act, 1906, provides that "where the subject matter is insured 'lost or not lost,' and the loss has occurred before the contract is concluded, the risk attaches unless, at such time the assured was aware of the loss and the insurer was not."

With regard to contracts of insurance effected by agents, s. 19 of the Act provides that the agent must disclose to the insurer (a) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and (b) every material circumstance which the assured is bound

to disclose, unless it comes to his knowledge too late to communicate it to the agent.

Hogg K.C. and *Jowitt* for the plaintiffs.

Stuart Bevan K.C. and *Claughton Scott* for the defendants.

The points taken in argument sufficiently appear from the judgment.

Cur. adv. vult.

May 12. The following judgment was read by

BAILHACHE J. This is a claim on a reinsurance policy on cargo in the steamship *Vigo* on a voyage from Italy to the United Kingdom. The defence is concealment of a material fact—namely, that part of the cargo had been destroyed by fire.

The decision depends upon the application of ss. 18 and 19 of the Marine Insurance Act, 1906, to the facts of this case.

By those sections it is the duty of the assured to disclose to the underwriter every material circumstance known to the assured, who is deemed to know every circumstance which, in the ordinary course of business, ought to be known to him, and when, as in this case, the insurance is effected by an agent, the agent must similarly disclose every material circumstance which in the ordinary course of business ought to be known by, or to have been communicated to him, and every material circumstance which the assured is bound to disclose unless it comes to his knowledge too late to communicate it to the agent. To this duty there is one exception material to this case—namely, the assured is not bound to disclose any circumstance known or presumed to be known to the underwriter, who is presumed to know matters of common notoriety or knowledge, and circumstances which an underwriter, in the ordinary course of his business as such, ought to know.

The facts are these. [The learned judge having stated the facts continued :] There can be no doubt that the fire was a circumstance which the plaintiffs ought to have disclosed had they known it. Indeed, they frankly admit that they

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should and would have done so. It is impossible in my view successfully to contend that such a circumstance need not have been disclosed by the assured because the underwriter might have found it out for himself by looking at the casualty board or at the casualty slips. The duty is the same if the fire is a circumstance which the plaintiffs must be deemed to know. The remaining questions then are, must the plaintiffs be deemed to have known it, and, if so, in time to communicate it to their broker? who, by the way, was as ignorant of the fact as were the plaintiffs and defendants.

Brokers do not receive the casualty slips and do not as a rule consult the casualty board before showing a risk in the room. In order to solve the two questions left, and to appreciate the plaintiffs' contentions upon them, it is necessary to state the plaintiffs' methods of business. [The learned judge having described the plaintiffs' methods of business in the terms set out above continued :] I was told by Mr. Hogg for the plaintiffs that the primary object of the slips is to give underwriters the latest available information in advance about risks that might be shown them during the day. If so, the plaintiffs do not seem to have used them for that purpose, as is shown by their being carried off to the claims department, which is not concerned with new business, but with losses on existing policies.

I am not, I think, concerned with the particular method in which the plaintiffs carried on their business. The question which I must ask myself is—was the casualty slip notice to the plaintiffs of the fire on the *Vigo*? and I think that it was. If it were not so, the magnitude of the business of an assured, or the extent of his personal attention to it, or even the pressure of a busy time, would always have to be considered in applying s. 18 of the Marine Insurance Act, 1906, and the same means of knowledge would have different results according to the way an assured chooses to run his business, and might even depend upon whether he was busy or slack, or whether his clerks were efficient or inefficient.

The argument for the plaintiffs is that because their

reinsurance department did not see the casualty slip and did not know its contents, therefore the plaintiffs did not know and cannot be deemed to have known of the fire. That argument does not appear to me to be sound. The question is not what the plaintiffs' reinsurance clerk ought to have known, but what the plaintiffs must be deemed to have known. The very object of the casualty slips is to give the latest possible information to the recipients, thus supplementing the daily index whose information does not go beyond the previous day. These slips are obviously useless unless they are read as and when they come in; if not they might as well cease to be supplied. An assured neglects the information given him by these slips at his peril.

If the slip had been duly attended to, there were at least four and probably five hours in which the information as to the fire might have been communicated to the brokers, and in my opinion this was ample time for the purpose. The case called for prompt action.

In my judgment, the defence is made out, and there will be judgment for the defendants with costs.

Solicitors for plaintiffs : *Coburn & Co.*

Solicitors for defendants : *Thomas Cooper & Co.*

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May 13.

RAWLINGS v. GENERAL TRADING COMPANY.

[1919. R. 751.]

Contract—Sale by Auction of Government Stores—Agreement by intending Purchasers for a “knock out”—Legality of.

If at a sale of goods by auction two or more intending purchasers, with the object of keeping down the price, agree that they will not bid against each other, but that one of them only shall bid, and that the goods bought by him shall be shared between them, that agreement is unenforceable as being against public policy, at all events where the goods so sold are the property of the public.

TRIAL of action before Shearman J.

The plaintiff was a London merchant, and the defendant was a Mr. E. H. Bradley who carried on business in Bermondsey under the style of The General Trading Company.

On June 12, 1919, the plaintiff attended at an auction sale at Dublin of surplus property belonging to the Ministry of Munitions for the purpose of purchasing certain tin shell-cases included in the catalogue for which he had a market. He was under the impression that he would be the only purchaser of tins from England, but in the sale room he saw the defendant, whom he knew to be a dealer in tins of that description. The defendant approached him, and on finding that the plaintiff was going to bid for the tins proposed that in order to avoid competition one of them should bid. This was agreed to. It was arranged that the defendant should bid on their joint account, and that whatever be purchased should be divided equally between them, each paying half the purchase-money. In pursuance of that agreement the plaintiff abstained from bidding, and the tins were knocked down to the defendant for the price of 342*l*. Two days later, on June 14, the plaintiff wrote to the defendant and offered to sell him his share of the profits for 150*l*. To that letter the defendant did not reply, until June 27, when he repudiated the alleged agreement and maintained that he had purchased the goods on his own account alone. The judge however did not

accept the defendant's account and found the facts as above set out. The action was brought to recover one moiety of the tins purchased, or 150*l.*, the value of the said moiety over and above the price paid for it at the auction, and alternatively for an account of the profits realized by the defendant on the resale of the goods.

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Walter Stewart for the plaintiff. An agreement between two or more persons not to bid against each other at a public auction but that one should buy on their joint account and then divide the profits between them is not illegal, as being contrary to public policy. The seller ought to protect himself against a sale at an undervalue by selling subject to a reserve, or stipulating in the conditions of sale that the auctioneer or some other person should be entitled to bid on the seller's behalf. It has uniformly been held in the Chancery Courts that an agreement between two intending purchasers at an auction of real estate not to bid against one another is valid. It is enforceable as between the parties to the agreement: *Galton v. Emuss* (1); and it does not entitle the vendor on discovering it to refuse to carry out the sale: *Heffer v. Martyn* (2); *In re Carew's Estate*. (3)

Charles Bray for the defendant. Such an agreement as that now sued on is contrary to public policy. In *Levi v. Levi* (4), an action of slander for calling the plaintiff "a common thief," the defendant justified on the ground that the plaintiff was one of a number of brokers who were in the habit of attending auctions at which they arranged for what is called a "knock out"—that is, they agreed that only one should bid for a particular article, that they should afterwards privately put it up for sale among themselves, and that the difference between the price which it fetched at the auction and the price on the resale should be divided between them. Gurney B. directed the jury that "Owners of goods have a right to expect at an auction that there will be an open competition from the public; and if a knot of

(1) (1844) 1 Coll. 243.

(2) (1867) 36 L. J. (Ch.) 372.

(3) (1858) 26 Beav. 187.

(4) (1833) 6 C. & P. 239, 240.

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men go to an auction upon an agreement among themselves of the kind that has been described, they are guilty of an indictable offence, and may be tried for a conspiracy." The agreement in the present case is not the less a "knock out" because there are only two parties to it. But even if such an agreement is not illegal where the vendor is a private person it is otherwise where the vendor is the State. There was an auction of public property, and the public had a right to expect public competition. The agreement was plainly contrary to the interest of the vendors, it was therefore contrary to the interest of the public, and that being so the Court ought not to enforce it.

Stewart in reply. Gurney B.'s direction in *Levi v. Levi* (1) was dissented from by the Privy Council in *Doolubdass v. Ramloll*. (2)

SHEARMAN J. This is a case of considerable importance, as it involves the question whether on a sale of Government stores by public auction, where no reserve is fixed, two or more buyers may agree that one of them only shall bid in order to keep down the price, and that they shall then share the profits between them. I have come to the conclusion that such an agreement is one which it is not the policy of the law to enforce. The facts of the case are these: Both the plaintiff and the defendant make a business of buying empty shell-cases and reselling them as tins for commercial purposes. As they had both received information that a sale was about to be held in Dublin of many thousands of these empty cases they went over there independently to attend the sale. Each had hoped to buy the goods very cheap, and on getting to the sale room was unpleasantly surprised to find that the other was also attending the sale. Just before the lots of tins were put up the defendant asked the plaintiff what he had come for. The plaintiff told him that he was there to bid for the tins. The defendant then said it was unfortunate that they should both have come on the same errand, and asked what the plaintiff suggested. The

(1) 6 C. & P. 239.

(2) (1850) 5 Moo. Ind. App. 109.

plaintiff replied: "We must share the goods"; and in reply to a further question as to which of them should buy the plaintiff said: "You can or I will, whichever you like." It was then arranged that the defendant should bid. The result was that the goods were knocked down to the defendant. The plaintiff subsequently wrote to the defendant to say that he would be willing to accept 150*l.* in cash for his share of the profits of the transaction, from which fact it is evident that the goods were knocked down at a price which was many hundred pounds below their real market value. In these circumstances can the contract be enforced? I am of opinion that it cannot. There seems to have been a difference of opinion between the Courts of common law and those of equity upon this question, the latter having taken a much laxer view of the propriety of such a transaction than the former. In *Galton v. Emuss* (1) where two persons desirous of purchasing certain real estate agreed not to bid against one another at the auction, Knight Bruce V.-C. held the agreement enforceable. In *In re Carew's Estate* (2) a similar agreement came before Lord Romilly, who held it to be no ground for annulling the sale. On the hearing of that case a passage was cited from the 13th edition of Sugden's Vendors and Purchasers, p. 93, in which the author said: "Fraud will, of course, be a sufficient ground for opening the biddings. Therefore, if the parties agree not to bid against each other . . . the Court would open the biddings." Lord Romilly did not agree with that view of Lord St. Leonards that such an agreement was a fraud on the vendor. The point came again before Lord Romilly in *Heffer v. Martyn* (3), where he followed his previous decision. In a still later case, *Chattock v. Muller* (4), before Malins V.-C., the point might have been taken, but it was not even argued, it being apparently considered that in the equity Courts the validity of such an agreement in connection with the sale of real estate was no longer open to argument. On the other hand, in *Levi v. Levi* (5) Gurney B. directed a jury that an

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(1) 1 Coll. 243.

(3) 36 L. J. (Ch.) 372.

(2) 26 Beav. 187.

(4) (1878) 8 Ch. D. 177.

(5) 6 C. & P. 239.

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agreement between brokers for a "knock out" at an auction sale was an indictable conspiracy. In *Doolubdass v. Ramloll* (1), which was an action upon wager contracts upon the price which opium would fetch at the next Government sale at Calcutta, it was held that an agreement between several persons (not being the vendors) to bid at the sale for the mere purpose of running up the price was not illegal. Parke B., who delivered the judgment of the Privy Council, said that the above statement of Gurney B. was a mere dictum in a *nisi prius* case, and could not be relied upon. In 1873 Wright J., then Mr. R. S. Wright, wrote a book on the Law of Conspiracy, in which he apparently accepted Gurney B.'s dictum as a correct statement of the law. At the time that he wrote that he was not aware of the above-mentioned case in the Privy Council. On his attention being called to it in 1897 in a case then being tried before him, he, in deference to that decision, withdrew his book from circulation. But the fact remains that in his own opinion such an agreement as the present was illegal. There is another kindred matter in connection with which the common law Courts again took a stricter view than the equity Courts—namely, the employment of a puffer at an auction. But this conflict between the two Courts was put an end to by the Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), which provided that the common law rule should prevail; and the provisions of that Act have since been extended to sales of goods by auction by s. 58 of the Sale of Goods Act, 1893. If the employment of a puffer for the purpose of raising the price without disclosing the fact will render a contract of sale unenforceable, it is difficult to see why a combination by purchasers to keep the price down should not equally be illegal. What is wrong in a vendor ought equally to be wrong in a purchaser. I am aware that there is some weight of authority against the view that I am taking, but there are cases and weighty opinions on both sides, and I hold the clear opinion that upon the old common law principles this is a contract which it is contrary to public policy to enforce, and where a judge

is of that opinion I think he should have the courage to say so. I am of opinion that, at any rate in such a case as this where the goods sold are the property of the public, it is against public policy that people should combine at an auction to procure the goods to be sold at a price considerably below the fair value, with the necessary result that the public are defrauded. I must hold therefore that the contract sued on is unenforceable and there must be judgment for the defendant.

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Judgment for the defendant.

Solicitors for the plaintiff : *Bolton, Jobson & Co.*

Solicitor for the defendant : *G. S. Crawshaw.*

J. F. C.

[IN THE COURT OF APPEAL.]

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PROVIDENT MUTUAL LIFE ASSURANCE ASSOCIATION v. OGSTON.

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OGSTON v. PROVIDENT MUTUAL LIFE ASSURANCE ASSOCIATION.

Income Tax—Treasury Bills—Difference between Amount paid on Purchase and Amount received on Realization—Whether “profits on discounts” or Accretion to Capital—No Transactions in Bills in last Year of Assessment—Liability to Tax—Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Sch. D, Case 3, Rule 2.

The difference between the amount paid to the Government by the purchaser of a Treasury Bill and the amount received by him on payment of at maturity is a “profit on a discount” within the meaning of Case 3, Rule 2, of Sch. D of the Income Tax Act, 1842.

Where a Treasury Bill is sold by the holder before maturity the only

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amount taxable under that rule is the amount by which the bill has increased in value by reason of its advance towards maturity.

The rule provides that the "profits on all discounts" are to be charged on "the full amount of the profits or gains arising therefrom within the preceding year" :—

Held, that it was a condition of liability to taxation under the rule that the taxpayer should have made some profit of the description therein mentioned during the year of assessment, and therefore a taxpayer who had, before the year of assessment, ceased to hold or to have any transactions in Treasury Bills was not liable to be assessed to income tax in respect of the profits or gains arising therefrom in the preceding year.

Decision of Rowlatt J. [1919] 2 K. B. 497 affirmed on the first point and reversed on the second.

APPEALS from two decisions of Rowlatt J. (1) on cases stated by the Commissioners for the Special Purposes of the Income Tax Acts.

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1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts the National Provident Institution for Mutual Life Assurance, hereinafter called "the Institution," appealed against assessments to income tax in the sums of 5422*l.* for the year ending April 5, 1918, made upon it by the said Commissioners.

2. The Institution is a company incorporated by Private Act of Parliament. In each of the years ending respectively April 5, 1916, and April 5, 1917, the Institution bought at the Bank of England certain Treasury Bills, some of which were held by it until maturity, others were sold in open market during their currency, and the remainder, being the whole of the Treasury Bills then held by the Institution, were early in 1917 converted into 5 per cent. War Loan. In the year ending April 5, 1918, the Institution did not hold or have any transactions in Treasury Bills. In each of the years ending respectively April 5, 1917, and April 5, 1918, the Institution received and paid interest, from which income tax was not deducted, on short loans to and from bankers.

(1) [1919] 2 K. B. 497.

3. In the year ending April 5, 1916, the amounts received by the Institution for Treasury Bills realized exceeded the amounts paid by it for Treasury Bills bought by the sum of 3552*l.* 5*s.* 7*d.* in the case of bills held to maturity and 1870*l.* 6*s.* in the case of bills sold or discounted, making in all 5422*l.* 11*s.* 7*d.* In the year ending April 5, 1917, the amounts received by it for Treasury Bills realized exceeded the amounts paid for bills bought by the sum of 5567*l.* 8*s.* 1*d.* in the case of bills held to maturity, and 14,147*l.* 0*s.* 6*d.* in the case of bills converted into War Loan, while it made a profit on short loans to bankers of 851*l.* 19*s.* 6*d.*, making in all 20,566*l.* 8*s.* The whole of the War Loan held by it on April 5, 1917, was still so held on April 5, 1918.

4. The Institution was not for any of the years ending April 5, 1916, 1917 and 1918, assessed to income tax under Case 1 of Sch. D on the balance of its profits and gains. For the year ending April 5, 1917, the first of the assessments under appeal was made upon the basis of the amount of the differences between the amounts paid and the amounts received in respect of Treasury Bills realized within the preceding year. For the year ending April 5, 1918, the second of the assessments under appeal was made upon the basis of the amount of the differences between the amounts paid and the amounts received in respect of Treasury Bills realized, together with the amount of the difference between the interest paid to and the interest received from bankers on short loans, within the preceding year. The Institution did not dispute its liability to assessment to income tax for the year ending April 5, 1918, in respect of interest on short loans on the basis of the net amount received within the preceding year, and the only questions raised by it related to its liability to assessment in respect of the differences between the amounts paid and the amounts received for Treasury Bills.

5. The Treasury Bills in question were issued under the Treasury Bills Act, 1877, and the regulations contained in the Treasury minutes of May 31, 1889, and April 13, 1915. By the former minute provision is made for the inviting of tenders for Treasury Bills, for the issue of Treasury Bills with a fixed

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 1920 the National Debt, or to such other person or persons as may
 NATIONAL be willing to buy the same, for the form of tender and the
 PROVIDENT disposal of the amount received, and in the schedule the
 INSTITUTION v. following form of Treasury Bill is prescribed :—
 BROWN, “ London, _____
 AND
 BROWN “ This Treasury Bill entitles* _____ or order
 v. to payment of _____ pounds at the Bank of England
 NATIONAL out of the Consolidated Fund of the United Kingdom on
 PROVIDENT the _____.
 INSTITUTION. “ _____,
 PROVIDENT “ Secretary to Her Majesty’s Treasury.
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 ASSOCIATION v. “ * If this blank be not filled in the Bill will be paid to
 OGSTON, bearer.”
 AND
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 v. By the minute of April 13, 1915, it is provided that Treasury
 PROVIDENT Bills shall be issued at fixed rates of discount at the Bank of
 MUTUAL England, and that the bills issued shall be in amounts of
 LIFE 1000*l.*, 5000*l.*, or 10,000*l.*, and shall be drawn for three six
 ASSURANCE nine or twelve months as the case may be, that particulars
 ASSOCIATION of the bills offered, and the rate or rates of discount for the
 time being in force shall be notified to applicants at the Bank
 of England, and that the offer shall extend to the general
 public subject to the conditions that their Lordships reserve
 the right of rejecting any applications, and that the rates
 shall be subject to variation from time to time without
 previous notice. The bills bought by the Institution were
 in the prescribed form, and were payable in some instances
 at three months, in others at nine months, and the remainder
 at twelve months after date.

6. It was contended on behalf of the Institution :—

- (a) that the differences between the amounts paid and the amounts received for Treasury Bills were an accretion to capital, and not income or annual profits and gains chargeable to income tax ;
- (b) that the tax, if assessable at all, was assessable only on payment of the bills at maturity, and on the person holding them at that date, and the bills sold or converted into War Loan during their currency

should be left out of account in computing any liability on the part of the Institution ; C. A.
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- (c) that in any case the assessment for the year ending April 5, 1918, could not be maintained, as the Institution did not hold or have any transactions in Treasury Bills in that year.

7. It was contended on behalf of the Surveyor of Taxes :—

- (a) that the sums in question, whether received at maturity or on sale or conversion of the bills, were profits on discounts chargeable to income tax under the Third Case of Sch. D (1) ;
- (b) that a person is liable to income tax under the Third Case of Sch. D on the basis of the full amount of the profits or gains arising from the sources comprised in that case within the preceding year and whether any profits arise to him from such sources within the year of assessment or not ;
- (c) that the Institution was in receipt of profits of a description comprised in the Third Case of Sch. D (namely, profits on loans to bankers) in each of the years of assessment, and was consequently chargeable to income tax under that case in each of those years on the basis on the full amount of the profits or gains from any source comprised in that case within the preceding year.

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8. The Commissioners confirmed the assessment for the year 1916–17. As regards the assessment for the year 1917–18 they concurred in the view put forward on behalf of the

(1) “Third Case. The duty to be charged in respect of profits of an uncertain annual value not charged in Sch. A :—

“First.—The duty to be charged in respect thereof shall be computed at a sum not less than the full amount of the profits or gains arising therefrom within the preceding year, ending as in the first case, to be paid on the actual amount of such profits or gains, without any deduction.

“Second.—The profits on all securities bearing interest payable out of the public revenue (except securities before directed to be charged under the rules of Sch. (C)) and on all discounts, and on all interest of money, not being annual interest, payable or paid by any person whatever, shall be charged according to the preceding rule in this case.”

C. A. Institution that the rule of the Third Case of Sch. D only provides a measure of liability in respect of profits from a source existing in the year of assessment. They were further of opinion that the receipt during the year of assessment of interest of money, not being annual interest, did not justify the maintenance of an assessment on the amount of the profits arising from discounts on Treasury Bills in the preceding year where no such discounts were received or bills held or dealt in during the year of assessment. They thought that all the distinct and separate descriptions of profits comprised in the Third Case should be treated as separate sources of income and separate subjects of assessment. They accordingly reduced the assessment upon the Institution for the year 1917-18 to the sum of 852*l.* in respect of interest of money. The Institution appealed against the decision of the Commissioners relating to the assessment for the year 1916-17. There was a cross-appeal by the surveyor against the decision relating to the assessment for the year 1917-18.

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At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts the above-mentioned Association appealed against assessments to income tax in the sums of 2659*l.* for the year ending April 5, 1917, and 8585*l.* for the year ending April 5, 1918. The Association, which is an insurance company registered under the Companies Acts, had during the years ending April 5, 1916, and April 5, 1917, purchased and discounted or sold during currency Treasury Bills and War Expenditure Certificates, and also French Treasury Bills. In the year ending April 5, 1918, it did not have any transactions in Treasury Bills or War Expenditure Certificates, but it held War Loan stock. The assessment for the year 1916-17 was made on the basis of the difference between the amounts paid and the amounts received in

respect of Treasury Bills discounted or sold within the preceding year. The assessment for the year 1917-18 was made on the basis of the difference between the amounts paid and the amounts received in respect of Treasury Bills and War Expenditure Certificates discounted or sold or paid off within the preceding year. The contentions were the same as in the former case. The Commissioners confirmed the assessment for the year 1916-17, and allowed the Association's appeal against the assessment for the year 1917-18 for the same reasons as those given in the former case.

The Association appealed against the decision of the Commissioners relating to the assessment for the year 1916-17. There was a cross-appeal by the Surveyor of Taxes against the decision relating to the assessment for the year 1917-18.

Rowlatt J. dismissed the appeals of both companies and allowed the appeals of the Surveyor of Taxes.

Both companies appealed. The two appeals were heard together on April 16, 19, 1920.

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Sir John Simon K.C., Hon. W. Finlay K.C. and Bremner for the appellant Institution. Treasury Bills are not liable to income tax in respect of the profit made when they are redeemed. Of course, if they are bought in the course of carrying on a business of investment, any profit made will be liable to tax: *Liverpool and London and Globe Insurance Co. v. Bennett*. (1)

In the case of an investment in Victory Bonds, the issue price was 85*l.* and the bonds carry interest at 4 per cent. and are repayable at 100*l.* The interest is income liable to tax, but the difference between the 85*l.* and the 100*l.* is an accretion to capital. So in the case of War Saving Certificates the increased amount payable at maturity is partly interest and partly an accretion to capital. It is like buying a debenture not carrying interest, or purchasing a reversion.

There may be three classes of investments:—

1. An investment producing interest and no accretion of capital;

(1) [1912] 2 K. B. 41, 51.

C. A. 1920 <hr/> NATIONAL PROVIDENT INSTITUTION v. BROWN, AND BROWN v. NATIONAL PROVIDENT INSTITUTION. PROVIDENT MUTUAL LIFE ASSURANCE ASSOCIATION v. OGSTON, AND OGSTON v. PROVIDENT MUTUAL LIFE ASSURANCE ASSOCIATION.	<p>2. An investment producing a combination of both, e.g., Victory Bonds.</p> <p>3. The investment of a sum of capital to be redeemed at a date by payment of a larger sum.</p> <p>It is sought to bring the profit upon a Treasury Bill within the liability to taxation by saying that it is a "profit on discount" within Sch. D, Case 3. The answer is that the difference between the amount paid and the amount received is not a discount but an accretion to capital.</p> <p>As to the meaning of the expression "profits on discounts" in Sch. D, Case 3, r. 2, it is submitted that what is aimed at is the taxation of the kind of profit which is realized in the ordinary commercial transaction of bill discounting. It cannot include a profit which accrues upon a Treasury Bill at maturity. That is not income but an accretion to capital. A Treasury Bill often changes hands many times before arriving at maturity. It cannot be that each holder in turn is taxable upon the difference between the price he paid and what he received for it.</p>
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As to the liability of the Institution to be assessed for the year 1917-18 in respect of the profits on realization of Treasury Bills in the preceding year it is submitted that Rowlatt J. was wrong and the Commissioners were right. What is taxable is the income of the year of charge. Sect. 2 of the Act of 1853, Sch. D, deals only with "annual profits or gains, which points to the profits of the year of assessment." It is only for the purpose of arriving at the quantum that the profits of a preceding year are brought into calculation.

The income of the preceding year creates no liability to taxation in the year of charge. It is only to be regarded for the purpose of measuring the liability arising otherwise. In the year 1917-18 the appellants had no transactions in Treasury Bills at all and made no profits upon which they could be assessed. In order to be taxable in a particular year the taxpayer must have an income arising from a source existing in that year, just as in taxing the profits of a trade the trade must exist in the year of charge in order to render the trader liable to assessment.

Bremner for the appellant Association.

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T. H. Parr and *R. P. Hills* (*Sir Gordon Hewart A.-G.* with them) for the Crown in the first appeal. The conclusion of the learned judge on both points was right.

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The question is whether the difference between what the appellants received upon the realization of the Treasury Bills whether at maturity or before is to be treated as the profits or fruit of the investment, or as an accretion to capital. The contention of the Crown is that it is a profit on discount. "Discount" in an ordinary commercial document has been held to mean rebate of interest and not "true" or mathematical discount: *In re Land Securities Co.* (1) See also *Buchanan & Co. v. Macdonald*. (2) The word is also defined in the Supplement to Stroud's Judicial Dictionary as "equivalent to the payment of interest in advance; e.g., when a banker advances the amount upon a bill of exchange which is not yet due, discounting the interest up to the day of payment"; and in Wharton's Law Lexicon as "a sum of money deducted from a debt in consideration of its payment before the stipulated time." What the Crown seeks to charge is income. In *Tennant v. Smith* (3) Lord Macnaghten says that the duty under Sch. D "is a tax on income in the proper sense of the word. It is a tax on what 'comes in'—on actual receipts." Victory Bonds are not analogous to Treasury Bills. These were issued at 85, representing nearly a 5 per cent. investment. They were an investment at the market rate of interest. The increased amount receivable when drawn for payment at par, or credited at par value for estate duty, is an additional capital sum bargained for to meet the probable fall in capital value likely to take place under present conditions. The true test is, it is submitted, is the object of the investment to obtain income from capital, or is it to make a capital profit? If the suggested profits are "profits on discounts" in the nature of a special kind of interest, they fall expressly within the words of r. 2 of Case 3 and are not accretions to capital. They are not analogous to profits made

(1) [1896] 2 Ch. 320.

(2) (1895) 23 R. 264; 33 S. L. R. 200.

(3) [1892] A. C. 150, 164.

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on the sale of land or of shares by a private individual. Here the transaction is really one of lending money at a profit. By s. 42 of the Finance Act, 1916 (6 & 7 Geo. 5, c. 24) the accumulated interest on War Savings Certificates was expressly exempted from income tax and that exemption was continued by s. 47 of the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), thereby showing that it was necessary to protect War Savings Certificates against taxation. There can be no difference in principle between War Savings Certificates and Treasury Bills.

Rule 2 of Case 3, although it affords an instance of the loose use of language, presents no difficulty in practice. The capital of a Treasury Bill is constant. It can never alter. The rate of discount varies during its currency and depends on market conditions. The value of the bill fluctuates during its currency because the rate of discount varies during that period. It is submitted that the Institution is taxable in respect of the amount by which the sums received by it on the realization of the Treasury Bills exceeded the price at which it bought them: *Clerical, Medical and General Life Assurance Society v. Carter*. (1)

On the second point it is submitted that for the year ending April 5, 1918, the Crown can tax the Institution in respect of profits from Treasury Bills received in the preceding year ending April 5, 1917, even though that particular source of income had ceased to exist in 1917-18. This is of the utmost importance, as otherwise the Crown would stand to lose one year's tax on the 5 per cent. War Loan. It is not necessary that sources within Case 3 should continue to exist during the year of assessment. Rule 1 of that Case is very explicit and charges duty on "the full amount of the profits or gains arising therefrom within the preceding year . . . to be paid on the actual amount of such profits and gains. . . ." A person could always avoid tax by dealing in Treasury Bills or holding War Loan 5 per cent. only every alternate year, buying after April 5 in year A and realizing before April 6 in year B, then in the year C (April to April) investing his

money otherwise. He could also take care to receive interest on short loans, only every alternate year, and thus escape tax altogether. Indeed, in the case of short interest on deposits at a bank there is really no holding of a particular source of income : there is merely an isolated or temporary lending of money. As Rowlatt J. pointed out in the Court below, the only existing source of income is the person himself—or it might be said the profit is from “ property ” (within the general charging section of Sch. D) ; the discount or interest arises from the use of money and the money or property still existed and would always exist as a possible source of profit.

It was admitted by counsel for the Institution that if there had been one dealing in Treasury Bills, however small, in the year ending April 5, 1918, and indeed even in the last month of that year, the assessment would have been good (assuming the profit to be a “ profit on discounts ”), and yet it is said, because there was in fact no dealing at all, the assessment was bad. That, as Rowlatt J. pointed out, is unreasonable.

Case 3 is an exception to the general principle of taxation in the other Cases and Schedules which necessarily involve the existence of the source of income during the year of assessment. Under Sch. A or B, land must necessarily be owned or occupied in the year of assessment. Under Sch. C public securities must be held, for the tax is on the actual income of the year. Under Sch. D, Cases 1 and 2, the trade or business must still be going on, and if it has ceased there are provisions for abatement and apportionment (see s. 134 of the Income Tax Act, 1842, and s. 24, sub-s. 3, of the Finance Act, 1907). Under Sch. D, Case 4, the tax on income from foreign securities is on the actual income of the year. Under Sch. D, Case 5, the tax is on the three years’ average of incomes from foreign possessions and is not exigible if the foreign investment is no longer held.

Just as in the case of short interest, where a person happens occasionally and casually to have money at interest in a bank, or receives interest on the purchase-money of real estate

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C. A. not paid at the given date, so too in the case of "profits
 1920 on discounts" the Legislature were faced with the difficulty
 NATIONAL that under the ordinary machinery a return of assessments
 PROVIDENT would be made in the ordinary course early in the year, say
 INSTITUTION v. May or June, when it would be impossible for the taxpayer
 BROWN, to know what profits, if any, of that kind might accrue to him
 AND during the year, as the tax would be payable on January 1,
 BROWN v. and possibly income from these sources might arise between
 NATIONAL that date and April. It was to meet this difficulty of a purely
 PROVIDENT hypothetical guesswork assessment that, in these exceptional
 INSTITUTION cases, the Legislature thought it better to tax this particular
 PROVIDENT kind of casual income retrospectively in the following year,
 MUTUAL when its amount would be definitely ascertained.
 LIFE Under Case 3 every taxpayer, being himself the existing
 ASSURANCE source of income, is potentially able to receive profits of an
 ASSOCIATION "uncertain annual value," for he is always in possession
 of money which he can lend at interest.

With regard to the point that income tax is imposed annually,
 it must be remembered that by s. 193 of the Act of 1842
 the tax was imposed for three years.

In *Fitzgerald v. Inland Revenue Commissioners* (1) it was
 held that the appellant was liable to pay super tax for the
 year of assessment in respect of his total earnings from all
 sources for the preceding year, although one of the most sub-
 stantial sources, namely, the profession of barrister-at-law, had
 entirely ceased to exist before the beginning of the year of
 assessment. The case really turned on the exact wording
 of s. 66, sub-ss. 1 and 2, of the Finance (1909-10) Act, 1910
 (10 Edw. 7, c. 8), which imposed an additional duty of
 income tax, called super tax, for the year of assessment, the
 super tax income to be taken to be the total income of the
 individual from all sources for the previous year. It was held
 that though super tax was a tax for the year of assessment, it
 was really a tax on the total income of the preceding year, and
 was exigible notwithstanding that all super tax sources of
 income might have ceased to exist. Much of the reasoning in
 that case is applicable to the present case. The judge there

(1) [1919] 2 K. B. 154.

rested his judgment on the fact that super tax was a retrospective tax. If his judgment is right it carries the Crown a long way. The judge there said that the section threw him back upon the income of the previous year. Here, as in that case, you have a retrospective tax intended to meet casual profits.

To sum up, Case 3 is an exceptional Case intended to hit profits of the nature therein described. It is not intended to hit a regular business, but, for example, deposits at a bank which could not be estimated, and therefore the Legislature has taken the profits of the preceding year as the amount on which the duty was to be computed.

It is not suggested that the Crown can have recourse to Case 6 of Sch.D. That case is not applicable to this case ; but if it is, the extraordinary result pointed out by Rowlatt J. in his judgment in this case would follow. The only thing the Crown is here seeking to charge is a profit on a discount, and the present case either falls within Case 3 of Sch. D or it does not.

The Crown is not, it is submitted, necessarily driven to contend that this is a retrospective tax. Assume that the possession of funds is a source of profit, then all difficulties disappear and Case 3 presents no differences for the other Cases. The Crown is only driven to contend that the tax is retrospective if it is wrong as to the hypothetical source of profit. Assume there is a potential source of profit in any one year, then there is taxability.

Profits on discounts do not, it is submitted, accrue de die in diem evenly over the period of the currency of the bill. The profit is only ascertainable at maturity or sale, as it is then that the profit " arises or accrues " within the meaning of the charging section (s. 2) of the Act of 1853.

It is admitted that there can be no apportionment. [They also referred to Income Tax Act, 1803 (43 Geo. 3, c. 122), s. 84 ; Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 6 ; Finance Act, 1916 (6 & 7 Geo. 5, c. 24), s. 64 ; Finance Act, 1917 (7 & 8 Geo. 5, c. 31), s. 18 ; Dowell's Income Tax Acts, 7th ed., p. 308.]

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1920 *Sir John Simon K.C.* in reply. As to the second or

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retrospective point. If the view of the judge on this point is right, an investment in public funds if the half-yearly income is more than 50s. falls within Sch. D, Case 3, r. 1 (c) of the Income Tax Act, 1918. It is not to be assumed as a matter of law that the Income Tax Acts cover all possible cases. Between the years 1842 and 1853 professional incomes were assessed on the profits and gains of the preceding year.

The tax was not retrospective.

The appellants are not called upon to assert that Case 6 is applicable in the present case. Historically Case 3 was intended to deal with salt mines by the Act of 1803.

Sch. D has always been treated as a schedule which picked up anything that was left by the other schedules.

On the main point one must look at the meaning "profits on all discounts" in r. 2 of Case 3. It is, it is submitted, open to grave question whether those words were intended to apply to an isolated transaction. Take a War Expenditure Certificate. The purchaser pays 900*l.* and the Government promises to pay him 1000*l.* in two years (January 1, 1916—January 1, 1918). In what year does this income arise? Suppose he realizes the certificate just before the end of one of the intervening fiscal years. It is not all profit on discount. It is accretion on capital due to the fluctuations of the money market.

The conclusion to which one is driven is that the words "profits on discounts" do not refer either to the person paying the money or to the person promising to pay it but to a third party.

Cur. adv. vult.

May 10. The following judgments in the Institution's appeal were delivered:—

LORD STERNDALÉ M.R. This appeal from Rowlatt J. raises two questions: first, whether the appellants are liable to be assessed to income tax on certain transactions in respect to Treasury Bills, and, secondly, if so, whether they are liable

to be so assessed in the last year in question when there were in fact no transactions of the description, and they received nothing in respect of any such transactions. The appellants were not assessed in the years in question under Sch. D in respect of the profits and gains of a business, but the Crown seeks to assess them under Case 3 of that schedule in respect of profits, or income derived from profits on discounts.

The transactions in question consist of the purchase of Treasury Bills, which are documents issued by the Government by which it undertakes to pay on the expiration of a term fixed in the bill a certain sum of money in consideration of a smaller sum paid down at once. The bills are therefore issued at a discount which is fixed from time to time by the Government. The rate of discount is at present $6\frac{1}{2}$ per cent. ; it was a short time ago $5\frac{1}{2}$ per cent. In some cases the appellants held the bills until maturity, in some they realized them by sale, and in some they converted them into War Loan. Sometimes the proceeds of the payment of the bills or of the sales were received in the same financial year as that in which the bills were purchased, and sometimes in a subsequent year. The Commissioners assessed the appellants to income tax in respect of the amount received at the maturity of the bills in excess of the price given for them by the appellants, and upon the profits made upon the sales in the years in which the sums were received. The first question depends upon whether this assessment can be justified under Sch. D, Case 3. "The duty to be charged in respect of profits of an uncertain annual value not charged in Schedule A." Rules 1 and 2 of this case are as follows:—Rule 1: "The duty to be charged in respect thereof shall be computed at a sum not less than the full amount of the profits or gains arising therefrom within the preceding year, ending as in the first case, to be paid on the actual amount of such profits or gains, without any deduction." Rule 2 is: "The profits on all securities bearing interest payable out of the public revenue (except securities before directed to be charged under the rules of Schedule C), and on all discounts, and on all interest of money, not being annual interest, payable or paid

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C. A. 1920 by any person whatever, shall be charged according to the preceding rule in this case."

NATIONAL PROVIDENT INSTITUTION v. BROWN, AND BROWN v. NATIONAL PROVIDENT INSTITUTION. PROVIDENT MUTUAL LIFE ASSURANCE ASSOCIATION. These transactions are said to come under the words "profits on all discounts." The expressions "profits on discounts" and "profits on interest" are curious, but I think they must mean, in substance, profits arising from discounts received on discounting transactions, and profits arising from interest received on securities bearing interest. The contention of the Crown is that when the appellants buy for 93*l.* 10*s.* a security for which at the end of a certain period they receive 100*l.* they make a profit by having bought the security at a discount and that this is rightly described as a profit on a discount. It is further contended that the same principle applies when they sell the security at an increased price by reason of its being nearer to maturity. The appellants, on the other hand, contend that they merely receive an accretion to their capital and not any income or annual profit or gain.

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I agree with Rowlatt J. that the case where the appellants hold the bill to maturity is a simple one. The transaction is that the Government borrow the money paid for the bill for a certain period and pay a larger sum at the end of that period, the difference between the two sums being the amount which they pay for the accommodation. In the form in which the transaction is carried out I think the amount is a profit made by buying a security at a discount and therefore comes within the somewhat odd term "profits on discounts."

The case where the bill is sold before maturity is not so simple. If all other elements were eliminated the increased value of the bill would be regulated by the extent to which it had advanced towards maturity. But the other elements cannot be eliminated. The price of the bill in the market depends upon the state of the money market and the rise or fall in the value of money and any increased price attributable to these causes cannot be taxed as profit on a discount. In the case of a sale, therefore, I think the only amount that can be taxed is the amount by which the bill has increased in value by reason of its advance towards maturity and the

consequent accrual of interest upon it. The amount of profit arising from the fluctuation in value of money does not arise from the discount, i.e., the difference between the present value and the value at maturity, and does not therefore come within the words "profit on a discount." It might be taxed as profits arising from a business of discounting, but the Crown have deliberately elected not to assess the appellants under this head, no doubt because in that case account would have to be taken of losses. It follows from this that the appellants have not been assessed on a right principle in the case of sales for they have been assessed on the total profits made on the sales, and the case should go back to the Commissioners in order that the proper adjustment should be made in these cases.

It has been pointed out that in some cases the face value of the bill or the profit on a re-sale is received in a different financial year from that in which the bill was bought, and in securities of longer date than Treasury Bills, i.e., War Expenditure Certificates, the interest may be accruing over three or even more financial years, but I do not think this fact presents any difficulty. The amount received is, in my opinion, to be taxed in the year in which it is received. Although it may be accruing over several years it only becomes taxable income in the year in which it is received.

I think in the case where the Treasury Bills were converted into War Loan the same principle applies as in the case of sales. On the first point, therefore, subject to the amount taxable in the case of sales and conversion being adjusted, the appeal, in my opinion, fails.

Some discussion took place as to the possible effect of the decision in this case upon dealings in other securities, e.g., Victory Loan and War Loan. I express no opinion as to those matters : they are not before us, and I have not present to my mind all the circumstances necessary for the formation of an opinion upon them. I think I ought to confine myself to deciding the case before me and not to consider any possible effect which that decision may have upon other cases. They must be decided when they arise.

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C. A. The second point arises in this way. In the last year
 1920 under consideration the appellants had no transactions in
 NATIONAL discounts of any kind, either Treasury Bills or otherwise,
 PROVIDENT and they contend that they ought not to be assessed in that
 INSTITUTION year as there were no profits arising from the source of profits
 v. on discounts. The Commissioners upheld this contention
 BROWN, but their decision was reversed by Rowlatt J. I think the
 AND Commissioners' decision was right on this point. It seems
 BROWN to me to be a general principle of income tax law that a person
 v. in order to be taxable in a particular year must have an income
 NATIONAL arising from a source existing in that year, and in order to
 PROVIDENT justify this assessment the Crown must show some reason
 INSTITUTION. for departing from that general principle. It is admitted
 PROVIDENT that if the taxation be in respect of a trade or business or an
 MUTUAL office or of property, the taxpayer must continue in the year
 LIFE of charge to carry on the trade or business or hold the office
 ASSURANCE or the property. It was, however, contended for the Crown
 ASSOCIATION. that the principle did not apply in this case because by the
 v. first rule of the Third Case the duty to be charged was computed
 OGSTON, according to the profits of the preceding year, and therefore
 AND if the last year was not taxed because there was no source
 OGSTON one year escaped taxation altogether. I do not think the
 v. first rule has this effect. The provision as to computation
 PROVIDENT of profits is the same as that in respect of trades, etc., in
 MUTUAL the first rule of the First Case, and it is admitted that in
 LIFE that instance the trade must exist in the taxable year in
 ASSURANCE order to make the taxpayer liable. I see no reason for
 ASSOCIATION. construing the same provision in a different way in the two
 Lord Sterndale rules; both refer to methods of computation only and are
 M.R. not directed to whether there is a taxable income or not.

Besides, as pointed out in Dowell's Income Tax Laws, 7th ed., p. 303, the Third Case originally dealt with property which must have existed in the hands of the taxpayer in the taxable year in order to make him liable, and it can hardly have been intended by the insertion of the second rule to alter the effect of the first. If the first year does escape taxation, it is because the Legislature has not inserted in the second rule of the Third Case such a provision as is found

in the first rule of the First Case. It is suggested by the Commissioners that the profits of the first year might be taxed under the Sixth Case. I do not think it necessary to decide that point, for even if they be not taxable it does not, in my opinion, show that the taxpayer can be taxed in respect of a source of income which does not exist.

The Crown, however, also contended that even if this conclusion be correct, the appellants should be assessed in the last year because there was in fact an existing source by reason of the fact that the appellants had money which could have been used for discounts if they had wished to use it. I do not think this is sound. The source is money employed in transactions involving discounts, and so making profits on discounts and not money itself probably employed in something quite different. Rowlatt J. seems to have held that the Legislature considered the taxpayer himself as the source of income, and as he says (1), must "have taxed him upon anything which he may have made under the heads in question in the year before." I cannot find any provision to this effect, unless it is to be found in the first rule of the Third Case, and for the reasons I have already given I do not think it is to be found there.

On this second point I think the appellants are entitled to succeed.

WARRINGTON L.J. Three questions arise in this case: (1.) Whether the difference between the amount paid to the Treasury for a Treasury Bill and the sum payable and paid at maturity is a profit in respect of which the holder of the bill is liable to be charged with income tax. (2.) Whether the profit made by selling the bills during currency for a higher price than that paid for them is a profit in respect of which the man who receives it is liable to be charged to income tax. (3.) Whether the subject is liable to be charged on the above heads if he has had no transactions of the nature in question in the year of assessment. The profits in question are brought into charge, if at all, under Sch. D and are to be

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C. A. charged annually on and paid by the persons receiving or
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If they are brought into charge at all they come under the Third Case as profits of an uncertain annual value not charged in Sch. A and are governed by the second rule, which reads as follows: "The profits on all securities bearing interest payable out of the public revenue (except securities before directed to be charged under the rules of Schedule C), and on all discounts and on all interest of money, not being annual interest, payable or paid by any person whatever, shall be charged according to the preceding rule in this Case."

The effect of this is that the duty is to be computed on a sum not less than the full amount of the profits within the year preceding the year of assessment.

The National Provident Institution, in the year ending April 5, 1916, purchased Treasury Bills for a large amount, paying, of course, a smaller sum than the sum payable at maturity. Some they held to maturity, and received the full amount secured thereby; others they sold or discounted receiving for those sums in excess of those paid. In the next year, the year ending April 5, 1917, they also purchased bills for a large amount some of which they held to maturity, receiving a larger sum than they paid. The rest of the bills held by the Institution, whether purchased during that year or held from the previous year, were converted into War Loan for a sum exceeding the sum paid for them. In the year ending April 5, 1918, the Institution neither held nor had any transactions in Treasury Bills.

For the years ending April 5, 1917, and April 5, 1918, they were assessed in the full amount of the differences realized as above mentioned in the years ending April 5, 1916, and April 5, 1917, respectively. On appeal to the Special Commissioners the assessment for the first year was confirmed, but that for the second year was discharged on the ground that in that year the source of income from which the profits in the preceding year were derived did not exist, and that the profits in the preceding year are not chargeable by themselves, but are only the measure for ascertaining the

amount of the chargeable profits in the year of assessment. If the source of such profits did not exist in the last-mentioned year, profits in the preceding year were immaterial. The Institution appealed on the first point and the Crown on the second. Rowlatt J. dismissed the appeal of the Institution and allowed that of the Crown. The Institution appeals.

I will take first the case in which a bill is purchased and held to maturity. These are paid for under a rate of discount, either fixed by the Treasury or offered by the purchaser and accepted by the Treasury. I agree with Rowlatt J. that in such a case what the purchaser really receives at maturity is the sum he paid together with interest on that sum for the period of the currency of the bill. This seems to me to be either a "profit on a discount" or a profit "on interest of money not being annual interest." The word "on" is not very appropriate in either case but I take it to mean "resulting from" in the one case and "derived from the receipt of" in the other, or some similar expression. I answer, therefore, in the affirmative the first of the three questions put to myself at the opening of this judgment.

As to the second question I can see no difference in principle between this and the first. When a holder, whether the original purchaser or not, realizes during currency, he really receives a proportion of the total profit resulting from the fact that the bill was bought at a discount. It is true that that proportion may not bear an exact relation to the period of currency but may be determined by variations in the value of money, in the public credit and so forth. But it seems to me that the total of the profits received by the various sellers after deducting losses, if any, cannot exceed the difference between the price originally paid and the sum payable at maturity, and that the considerations I have referred to merely affect the distribution of that difference between the various holders. Profits made by discounting bills seem to me to rest on the same footing, and conversion into War Loan also. This last is simply a sale on certain terms fixed by the Government and investment of the proceeds. The second question therefore must, in my opinion,

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be answered in the affirmative. I agree that the profits must be treated as profits of the year in which they are received.

The third question is, I think, one of great difficulty, and whichever way it is answered the result is not, in my opinion, wholly satisfactory. On the one hand, if the contention of the Institution is to prevail, profits of the nature in question in, say, the year 1916-17 would escape altogether merely because there were no transactions of the particular nature in the succeeding year; it may be they would properly be taxed under the Sixth Case, but on this point I prefer to express no opinion until it is directly raised and argued. On the other hand, if the view of the Crown is correct, a man who had parted with all sources of income as, e.g., by bankruptcy, might be assessed retrospectively on profits accruing before the happening of that event.

Now, it is common ground that in general, according to the scheme of the Income Tax Acts the tax is payable in respect of a source of income existing in the year of assessment, and that the profits of the preceding year, or the average of the profits of several preceding years, are respectively used merely as a measure for the purpose of taxation of the amount of the profits in the year of assessment.

Excluding for the moment the case in question, the general rule appears to me to apply to every schedule and to every case under each schedule (with the possible exception of Case 6 under Sch. D) and even to cases coming under the first and third rules of Case 3. If, therefore, the view of the Crown is correct the cases coming under the second rule of Case 3 stand (with the possible exception above mentioned) entirely by themselves and afford a single instance of retrospective taxation for the purpose of income tax. I think the burden is on the Crown to make out that on the construction of the Acts such an exceptional case exists.

I thought at one time that, inasmuch as the general principle is founded not on any express enactment but on an implication arising from the general scheme of the Acts, the apparently casual nature of the profits in question might afford a sufficient ground for excluding the implication in their case.

But on consideration I have come to the conclusion that this circumstance is not enough to support a decision in favour of so large a departure from what has hitherto been regarded as a settled principle in the application of the Acts.

As to the non-existence of the source of income in the year of assessment I agree with the decision of the Special Commissioners. It was argued before us that the source of income was the possession by the Institution of funds for investment and that such source existed although no funds were invested in the particular manner in the year of assessment. I cannot accept this construction. I think the source to be looked for in each case is a separate source from which the profits to be charged are derived. For these reasons I agree with the other members of the Court that on this point the appeal of the Institution succeeds.

SCRUTTON L.J. The National Provident Institution is an insurance company investing its funds in various securities including Treasury Bills, and assessed to income tax, not on its trade as an insurance company, but under Case 3 of Sch. D on the interest on its securities. This case raises two questions: First, on what principle, if at all, it should be taxed on its gains from Treasury Bills; and, secondly, whether it can be taxed on income from Treasury Bills in a year in which it holds none. A Treasury Bill is a promise by the Government to pay a fixed sum on a future day, usually three, six, or twelve months ahead, purchased by the payee for a smaller sum payable at once. The difference between the two sums is really interest on a loan of the original price by the purchaser to the Government for the period of the bill. The Government state that they will sell Treasury Bills at a rate of discount. At present they will sell a twelve months' bill for 100*l.* for 93*l.* 10*s.* 6½ per cent. is the rate of discount and the interest on a loan of 93*l.* 10*s.* to the Government for twelve months.

Under the Act of 1842, Sch. C charged all profits arising from annuities, dividends and shares of annuities payable out of any public revenue, with a provision in s. 97 that

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C. A. interest payable out of the public revenue on securities issued
 1920 by the Exchequer or other public office should also be
 NATIONAL charged under Sch. C, and a provision in s. 95 that small
 PROVIDENT dividends under fifty shillings, otherwise chargeable under
 INSTITUTION Sch. C, should be chargeable under the Third Case of Sch. D.
 v. Sch. D in the Act of 1842 taxed profits or gains from property
 BROWN, or trades, and its Third Case taxed profits of uncertain value
 AND not charged in Sch. A, the second rule referring to the profits
 BROWN on all securities bearing interest payable out of the public
 v. revenue, except securities before directed to be charged
 NATIONAL under the rules of Sch. C (which would seem to refer to s. 97),
 PROVIDENT and (profits) on all discounts, and (profits) on all interest of
 INSTITUTION money not being annual interest. Sect. 102 was an express
 PROVIDENT charging section on annual interest which was not expressly
 MUTUAL mentioned in Sch. D as it then stood. When the Act of
 LIFE 1853 was passed "interest" was expressly added to Sch. C,
 ASSURANCE and a clause was added to Sch. D expressly charging "interest
 ASSOCIATION and other annual profits and gains not charged by virtue
 v. of any of the other schedules."
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What is the position, then, of the person who purchases, say, a six months' Treasury Bill "at the rate of discount of $6\frac{1}{2}$ per cent.," and (1.) holds it till maturity and cashes it, or (2.) sells it during currency at the then market price. It appears to me that in the first case if the form of the Treasury Bill prevents it being described as a security bearing interest, because the promise to pay 100*l.* is not to pay 100*l.* and interest, there is clearly a "profit on a discount." The phrase is an odd one, as is the next phrase "profit on interest." It must be elliptical for "profit on (a security bought at)" or "profit on (a transaction involving) a discount." "Profit on (a security yielding)" or "profit on (a transaction producing) interest," the profit being the amount of interest or discount respectively. As the effect of the transaction is that the purchaser at a price obtains at maturity his price back with an increase in fact representing interest upon it, in my opinion the real interest, though not paid under that name, is taxable as "profit on a discount" under the second rule of the Third Case of Sch. D, the amount to be assessed

(subject to the point about the year of assessment) being the difference between price originally paid and amount received back.

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The case where the bill is sold during currency is a little more complicated. The interest or discount is accruing proportionately to the time expired since payment, but the market price may not be simply the price paid plus a proportionate part of the interest accrued at the original rate of discount or interest. The value of money may have fallen or risen, and this may affect the price of the bill. For instance, when the Treasury increased the rate of discount from $5\frac{1}{2}$ to $6\frac{1}{2}$ per cent. the price of Treasury Bills would at once fall. A purchaser would not give 94*l.* 10*s.* to get 100*l.* twelve months hence when he could get such a security from the Treasury for 93*l.* 10*s.* ; and where the value of money was falling, a seller of Treasury Bills would get more than his original rate of discount or interest in the price on realization. The price, therefore, of a Treasury Bill would depend on two matters : (1.) How much interest or discount had accrued by the progress of the bill towards maturity ; (2.) How much the value of the promise to pay had altered by the rise or fall of the value of money. While in taxation of a trade the latter element would be included in the profits of the trade, in my opinion in the taxation of interest or discount it is not included, for it is appreciation or depreciation of the capital sum. If the Crown taxed an insurance company, or a discount house, as a trade, then profits by the sale of bills during currency would be included, but then the taxpayer would deduct his working expenses and his losses. The representatives of the Crown think they do better by taxing an insurance company on the interest of its accumulated funds, and not as a trade. They may be wise to do this, but if they make this election they cannot, in my view, assess as interest or discount what is really a profit from buying and selling, additional to interest. The result in the present case appears to be that where the Institution has been taxed in respect of the year when Treasury Bills mature, on bills held to maturity, on the difference between amounts paid

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C. A. and amounts received, it is rightly taxed; but that where
 1920 the Institution is taxed on bills sold or discounted within
 NATIONAL the year on the difference between amounts paid and amounts
 PROVIDENT received, it is wrongly taxed, for it is being taxed not only on
 INSTITUTION interest or discount, but on an amount increased by appre-
 v. ciation or accretion, or decreased by loss, of capital. The
 BROWN, amount of assessment should be, in the case of each bill,
 AND on the amount of interest which would be received if the bill
 BROWN were held to maturity, reduced by proportion to the time
 v. for which the bill was held as compared with the time of full
 NATIONAL currency. For instance, a twelve months bill for 100*l*.
 PROVIDENT bought at 95*l*. and sold after six months represents 2*l*. 10*s*.
 INSTITUTION interest; the difference of price obtained below or above
 PROVIDENT 97*l*. 10*s*. represents loss of or accretion to capital. The term
 MUTUAL "discount" as explained in *In re Land Securities Co.* (1),
 LIFE is, I think, used in the commercial meaning of interest on
 ASSURANCE the sum secured, or to be received, and not in the mathe-
 ASSOCIATION matical meaning of the sum necessary at a given rate of
 v. discount to raise the sum paid to the sum secured.
 OGSTON, The assessment in this case on bills sold does not proceed
 AND on this basis, and should be sent back to the Commissioners
 OGSTON to be adjusted on the principle stated. In the case of a bill
 v. bought in one year of assessment and sold or matured in
 PROVIDENT another, the interest or discount falls to be taxed in the year
 MUTUAL when the profit is received, though part of it was earned but
 LIFE not received in a previous year.
 ASSURANCE The second point arises because the Crown contend that
 ASSOCIATION as the Institution made profits by discounts in the year 1917,
 Scrutton L.J. and, as by the first and second rules of the Third Case of
 Sch. D, profits on discounts are to be computed at the amount
 of the gains arising therefrom in the previous year, the Crown
 can assess profits on discounts for the year 1918, a year in
 which no Treasury Bills were held and there were no profits,
 on the amount of the profits in the previous year 1917. The
 Commissioners declined to do this, taking the view that an
 assessment required a source of profit in the year of assessment.

The learned judge below took a different view and appears to hold that, if under this case you have a taxpayer in a year of assessment, you may tax him for that year on any profit under Case 3 he made in the year before, though he has no such source of profit in the year of assessment. As he says (1): "In the case of profits from discounts there is no existing source to be looked for in the year of assessment in order to support the tax." . . . The Legislature "have regarded the taxpayer himself as the only source which must exist in the year of assessment."

In my view on the general scheme of the Income Tax Acts it is clear that an assessment for any year requires a taxable subject-matter in that year, though the conventional value of the income from that subject-matter may be measured in the first instance by the average income of previous years.

Under s. 2 of the Act of 1853 the duties are granted yearly for and in respect of the several properties described in the schedule; and by s. 48 of the Taxes Management Act, 1880, the year of assessment for income tax is from April 6 to the following April 5. I cannot find any trace of a right to assess for any year a taxpayer in respect of property which he does not hold at all in that year. I do not gather that it is suggested that a taxpayer can be assessed under Sch. A or B for a given year if in that year he neither owns nor occupies any land, or under Sch. D for a trade which he does not carry on at all in that year, or under E for an office which he does not hold in that year. The immediate reason suggested is that the duty to be charged under the Third Case of Sch. D is by the first rule thereunder to be computed on the profits or gains arising therefrom in the previous year; but it seems to me clear that the duty is to be charged on profits in the year of assessment, and if there are none the opportunity for valuing them by the conventional rule of the previous year's profits never arises. Under Sch. D, Case 1, indeed, the "duty was to be computed" on an average of previous years; but it has never been suggested that this is a

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C. A. retrospective taxation, taxing a man on a trade not carried on
1920 in the year of assessment, on the three previous years' average.

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When the first rule of the Third Case was framed in 1803 (43 Geo. 3, c. 122, ss. 84, 102), it was limited to certain mines and other concerns on land, and I do not understand it to be suggested that the first rule then applied to justify an assessment when there was no mine in the year of assessment. "Interest" was brought in in 1805, into the second rule, but I do not see that this could alter the meaning of the first rule.

Rowlatt J. appears to have been impressed with two points. The first is that on this view, if there is a small discount in the year of assessment you will yet conventionally value it on the much larger profits of the preceding year. This is true of all conventional valuations, but I think the learned judge must have temporarily overlooked that the taxpayer would, until 1907, recover the excess back by an application under s. 133 of the Act of 1842. If he does not since 1907 recover the excess, it is because Parliament has not provided means in this case to correct the conventional valuation when it turns out to be erroneous, having by the Finance Act of 1907, s. 24, repealed s. 133 of the Act of 1842. The learned judge was impressed also by the contention that if you are assessed on the profits of the previous year, you do not pay on your first year's profits, for there is no previous year; and do not pay in the next year, for there is no source of income. Personally, I am inclined to think the view of the Commissioners is correct that in the first year you could be assessed under the Sixth Case of Sch. D, for these profits could not be assessed under any of the preceding rules. The question is whether interest which cannot be assessed under Case 3 because there are no such gains in the preceding year as required by r. 1, is "profits not falling under any of the foregoing rules." The learned judge suggests that in this case the taxpayer could be assessed in both the first and second years on the profits of the first year. I think he could, but in the learned judge's first illustration he would, until 1907,

have got back in the second year the tax on 990*l.* under s. 133 of the Act of 1842. I think the learned judge is right in saying that in his second illustration: 10*l.* first year; 1000*l.* second year; nil third year, the taxpayer would only be taxed on 20*l.*, but this is because there seem to be no means of correcting a conventional valuation by increasing it to actual profits, though s. 133 used to give a means of correction by reducing it to actual profits. The same result undoubtedly happens under Case 1 of Sch. D. If a trader makes profits: first year 2000*l.*; second year 4000*l.*; third year 6000*l.*; fourth year 8000*l.*; he will be assessed for the fourth year on 4000*l.* the average of the three preceding years. If he suddenly stops his business at the end of the fourth year, he cannot be assessed in the fifth year at all, for there is no trade to assess, and the profits of the fourth year will escape taxation. This may be a reason for legislating, but is not one for putting a strained and impossible construction on the language of the Acts. When the learned judge holds (1) "that in the case of profits from discounts there is no existing source to be looked for in the year of assessment in order to support the tax," I cannot agree with him. I think his view is contrary to the whole scheme of income tax legislation, and I agree with the view of the Commissioners that a source existing during the year of assessment is necessary to support an assessment, though when so existing it is conventionally valued with reference to a previous year.

Counsel for the Crown argued that if it was necessary to find a source of profits in the year of assessment, they could obtain it if the taxpayer had money though he did not use it at interest or discount. But the taxable matter is "discounts," and "interest on money," not the money itself. They further argued that as there were short interest transactions which made a loss, this would do as a source of income to support conventional valuation on the previous year. Again, in my opinion you must find profits on discounts to justify the conventional value of them. Parliament may or may not

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(1) [1919] 2 K. B. 497, 512.

C. A. have inserted provisions for correcting the conventional
1920 valuation to the real facts, but the presence or absence of

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such special provisions does not seem to me to affect the cardinal principle that the tax is on profits from property existing in the year of assessment, though it may be conventionally valued by reference to the profits of a preceding year, and when I find every schedule and rule but this depending on the presence of source of profits in the year of assessment; when I find the language of the first rule of Case 3 framed in 1803 at a time when it required a source of profit in the year of assessment; when I find identical language applied to other cases, such as Case 1 of Sch. D which also requires profits in the year of assessment, I see no ground for supposing that in this case only you may assess a man in respect of property of which he has none during the year of assessment.

It was much discussed before us what the consequences of allowing this appeal might be on subject-matters which are not before us, War Loan and Victory Loan. I prefer to reserve opinion on these matters till they come before us in proper form. It may be that Parliament has passed certain specific enactments without appreciating their consequences. That is a matter for Parliament to rectify if it can, and if it desires to. It is not the business of the Courts to form their decisions, not by construction of the statutes but by consideration of the effect of their decisions on other subject-matters. I also desire to reserve my opinion on the question whether a man who has no income at all in the year of assessment, can be taxed to supertax because of his preceding year's income.

In my view the appeal of the taxpayer on the second point succeeds, and the assessment for the last year in which no Treasury Bills were held should be discharged.

LORD STERNDALÉ M.R. What about the appeal in the other case?

Bremner. It has been agreed between the parties that the judgments of your Lordships in the previous case which

have just been delivered should govern this case also, so that there will be the same order.

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LORD STERNDALE M.R. Very well.

Appeals in each case dismissed on first point and allowed on second.

Solicitors for National Provident Institution : *Hair & Co.*
Solicitors for Provident Mutual Life Assurance Association : *Hair & Co.*
Solicitor for the Surveyors of Taxes : *Solicitor of Inland Revenue.*

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W. I. C.

[IN THE COURT OF APPEAL.]

OWNERS OF STEAMSHIP RICHARD DE LARRINAGA v.
COMMISSIONERS FOR EXECUTING THE OFFICE
OF LORD HIGH ADMIRAL OF THE UNITED
KINGDOM AND OTHERS.

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Insurance (Marine)—War Risk—Warship on Voyage to pick up Convoy—Collision with Merchant Vessel—Absence of Navigation Lights—“Consequences of hostilities or warlike operations.”

On the night of July 23, 1917, a merchant vessel was sailing in convoy from the United States to England, and, in obedience to Admiralty orders, was steaming without lights. The night was very dark. The convoy was moving at six to seven knots. One of His Majesty's warships was at the same time on a voyage to pick up a convoy of merchant vessels and was steaming without lights at twelve knots. The two ships sighted one another at close quarters and a collision occurred in which both ships were damaged. There was no negligence in the navigation of either ship. The merchant ship was insured under a marine risks policy containing the usual f.c. and s. clause and a war risks policy which covered “all consequences of hostilities or warlike operations by or against the King's enemies.”

Bailhache J. held that the war risks underwriters must bear the loss, inasmuch as, although the warship was not at the material moment actually engaged in convoying vessels but was going to a point at which

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she was to take up the duty of escorting a convoy, she was engaged in a warlike operation, and the collision was therefore a consequence of a warlike operation.

On appeal:—

Held, dismissing the appeal, that the case was concluded by the decisions in *Ard Coasters v. The King* (1920) 36 Times L. R. 555, and *British Steamship Co. v. The King* [1918] 2 K. B. 879.

Decision of *Bailhache J.* [1920] 1 K. B. 700 affirmed.

APPEAL from the judgment of *Bailhache J.* upon an award stated by an arbitrator in the form of a special case. (1)

The claim in the arbitration arose out of a collision between the steamship *Richard de Larrinaga* and H.M.S. *Devonshire* in the Atlantic Ocean on July 23, 1917. The *Richard de Larrinaga* was insured under two policies, a marine risks policy containing the usual f.c. and s. clause, and a war risks policy.

At the time in question the *Richard de Larrinaga* was sailing in a convoy at a speed of about six to seven knots an hour. In obedience to Admiralty orders she was exhibiting no lights. The night was very dark. H.M.S. *Devonshire* had been on duty at Halifax and was on a voyage to Hampton Roads to pick up a convoy of merchant vessels. She was making a speed of about twelve knots an hour and was exhibiting no lights. The two ships sighted one another at close quarters and very shortly afterwards the collision occurred. A good lookout was being kept on each.

By a memorandum of agreement made November 2, 1918, between the owners of the *Richard de Larrinaga* of the one part, the Liverpool and London War Risks Insurance Association of the second part, certain marine underwriters as set out in the schedule thereto of the third part and the Treasury Solicitor for and on behalf of the Commissioners for executing the office of Lord High Admiral of the United Kingdom of the fourth part, the questions of liability for the collision and whether the damage sustained by H.M.S. *Devonshire* and the *Richard de Larrinaga* respectively arose from a marine or a war peril were referred to an arbitrator.

On June 18, 1919, the arbitrator issued an interim award,

whereby he determined that it was not established that either of the ships was to blame for the collision. Subsequently the marine underwriters and the War Risks Insurance Association came before him for the determination of the question whether the collision arose from a marine or from a war peril. By clause 2 of the war risks policy upon the *Richard de Larrinaga* it was provided that : " This insurance is only to cover the risks of capture, seizure, and detainment by the King's enemies, and the consequences thereof or any attempt thereat, and all consequences of hostilities or warlike operations by or against the King's enemies whether before or after declaration of war, but this insurance shall not be subject to a three per cent. or other franchise."

Clause 9 : " The said ship shall be deemed to be at all times fully insured against all perils covered by an ordinary Lloyds' policy with collision clause attached and containing an f.c. and s. clause in the following terms : ' Warranted free from capture, seizure, and detention, and the consequences thereof, or any attempt thereat, barratry, piracy, riots, and civil commotions excepted and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.' And to be fully entered in the Liverpool and London Steamship Protection Association, Limited, and no claim whatever against which a ship is deemed to be otherwise insured or protected as aforesaid or against which she is in fact insured or protected by any other insurance policy or Protection Association shall be recoverable under this policy."

It was contended by counsel on behalf of the marine underwriters that the collision arose from a war peril and was a consequence of hostilities or warlike operations because the collision was caused by the fact that in obedience to Admiralty orders : (1.) the two ships were navigating on a dark night without lights ; (2.) that as the *Richard de Larrinaga* was sailing in convoy she was engaged in a " warlike operation " and that fact was the cause of the collision ; and (3.) that H.M.S. *Devonshire* was a warship engaged in a warlike operation, and that a collision with her was in the

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On behalf of the war risks underwriters it was contended that the collision was caused by a marine and not a war peril, and was not a consequence of "hostilities or warlike operations." It was urged that the fact that the cause of the collision was the absence of lights in obedience to Admiralty orders did not make it a consequence of hostilities or warlike operations; that the fact that the *Richard de Larrinaga* was sailing in convoy did not constitute a warlike operation; that H.M.S. *Devonshire*, although a warship, was not performing a warlike operation, but was at the time in question engaged on a peaceful errand—namely, on a voyage for the purpose of picking up and protecting a convoy of merchant ships, and that a collision with her was not a consequence of "hostilities or warlike operations."

The question in dispute was whether the collision arose from a marine or a war peril.

Subject to the opinion of the Court the arbitrator determined that the collision was a consequence of hostilities or warlike operations and was caused by a war peril, and he awarded that the war risks underwriters were liable.

The Admiralty Commissioners did not appear on the hearing of the special case, the dispute being between the marine risks underwriters of the *Richard de Larrinaga* on the one hand and the war risks underwriters (the Liverpool and London War Risks Insurance Association) on the other.

Bailhache J. held that the war risks underwriters must bear the loss, as, although the warship was not at the material moment actually engaged in convoying vessels but was going to a point at which she was to take up the duty of escorting a convoy, she was engaged in a warlike operation, and the collision was therefore a consequence of a warlike operation. He accordingly affirmed the award.

The war risks underwriters appealed.

Raeburn K.C. and S. Lowry Porter for the appellants. At the time of the collision the *Devonshire* was not engaged

in a warlike operation. She was proceeding from Halifax to Hampton Roads to pick up a convoy—that is, to begin a warlike operation in the future. She was not directly engaged in a warlike operation, but was on a peaceful voyage. She was doing nothing but what an ordinary merchant vessel would have done on the same voyage. It is not necessary, in order to prevent the operation being a warlike operation, that the vessel should be engaged in the carrying on of commerce. The vessels may have been engaged in an operation in war, but not in a warlike operation: per Atkin L.J. in *Britain Steamship Co. v. The King* (the *Petersham*); *British India Co. v. Green* (the *Matiana*) (1), two cases which were heard together. Those cases show that the vessels in the present case, though navigating without lights, were not engaged in a warlike operation as there defined. See also as to “warlike operations,” *Robinson Gold Mining Co. v. Alliance Co.* (2) In *Ard Coasters v. The King* (3) the destroyer was directly engaged in a warlike operation—namely, patrolling on the lookout for submarines.

If the *Devonshire* was at the time engaged in a warlike operation, it was not the direct and proximate cause of the loss. The loss was caused by pure accident owing to the fact that neither vessel was carrying lights. The collision arose in the course of the warlike operation of the *Devonshire*, but did not arise out of it, that is to say, it did not occur as a direct consequence of it. It would have happened if the *Devonshire* had been an ordinary merchant vessel. She was navigating as an ordinary merchant vessel would have navigated. In *British Steamship Co. v. The King* (the *St. Oswald*) (4), as was pointed out in the *Petersham* and *Matiana Cases* (5), it was admitted that both vessels were engaged in a warlike operation, whereas in the present case the *Richard de Larrinaga* was not, and the warlike operation of the *Devonshire* had no connection with the navigation of the former vessel. Again, in *Ard Coasters v. The King* (3)

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(1) [1919] 2 K. B. 670, 696. (3) 36 Times L. R. 555.

(2) [1902] 2 K. B. 489, 500. (4) [1918] 2 K. B. 879.

(5) [1919] 2 K. B. 682, 686, 695.

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 RICHARD the *Ardgantock* was performing an essential part of a
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 (OWNERS OF thereof. The judgment of the learned judge was therefore
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BANKES L.J. In this case a collision occurred at night between H.M.S. *Devonshire* and the merchant vessel *Richard de Larrinaga*. The night was dark, and acting under Admiralty orders neither vessel was exhibiting lights. The *Richard de Larrinaga* formed part of a convoy of considerable size. They were proceeding at a speed of six to seven knots an hour. The *Devonshire* was proceeding at a speed of twelve knots. Both vessels were damaged by the collision, and the arbitrator has found that neither was to blame. The question is whether the marine underwriters or the war risks underwriters are liable for the damage. That depends upon whether the damage can properly be said to have been the consequence of a warlike operation against the King's enemies. In my opinion it is too late to give effect in this Court to any part of the argument of the appellants, even if we agreed with it, because both points which have been taken are concluded by previous decisions of this Court. I cannot distinguish the facts of this case from those in *Ard Coasters v. The King*. (1) In that case H.M.S. *Tartar* was engaged in patrolling on the lookout for submarines. In the present case H.M.S. *Devonshire* was on a voyage to take up a convoy of merchant vessels. That is so found by the arbitrator, and I read it as a finding that the warship was proceeding under orders to a rendezvous to pick up, as he expresses it, a convoy which was either waiting for her or about to assemble there. Counsel for the appellants said that the *Devonshire* was at the material time proceeding on a peaceful voyage with a view later on to engage in a warlike operation. I do not agree with that contention. I think that the warship while proceeding to her station in

(1) 36 Times L. R. 555.

order to pick up a convoy was at the time she was so proceeding engaged in a warlike operation.

The second point taken was that, assuming it was a warlike operation, the warlike operation was not the proximate and direct cause of the damage. In my opinion this point is covered by the decisions of this Court in the *St. Oswald Case* (1) and *Ard Coasters v. The King*. (2) Counsel for the appellants sought to draw a distinction between the present case and the *St. Oswald Case* (1) by saying that in the latter both the vessels which came into collision were engaged in a warlike operation, whereas in the present *H.M.S. Devonshire* was and the *Richard de Larrinaga* was not. Assuming that to be so, then the present case is the same as *Ard Coasters v. The King* (2), because there the *Tartar* was engaged in a warlike operation, but the *Ardgantock* was not.

For these reasons in my opinion the case is covered by authority, and the appeal fails.

SCRUTTON L.J. When this group of cases reaches the House of Lords the interesting and ingenious arguments of the appellants will demand careful consideration. In this Court I do not see my way to distinguish this case from *Ard Coasters v. The King*. (2) Whether the decision in that case is consistent with the decision in the *Petersham Case* (3) is a matter which the House of Lords will have to consider, and if they come to the conclusion that it is not, they will have to say which is right. So far as this Court is concerned the question has been determined by the decision in *Ard Coasters v. The King*. (2)

ATKIN L.J. agreed.

Appeal dismissed.

Solicitors for war risks underwriters: *Parker, Garrett & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for marine risks underwriters: *Charles Lightbound & Co.*

(1) [1918] 2 K. B. 879.

(2) 36 Times L. R. 555.

(3) [1919] 2 K. B. 670.

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THE KING *v.* SECRETARY OF STATE FOR HOME
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Alien—Deportation Order—Power of Secretary of State—Aliens Order, 1919, art. 12 (1.)—Aliens Restriction Act, 1914 (4 & 5 Geo. 5, c. 12), s. 1, sub-s. 1 (c).

Art. 12, para. 1, of the Aliens Order, 1919, which empowers the Secretary of State "if he deems it to be conducive to the public good" to make a deportation order against an alien is not *ultra vires*. In acting under the article the Secretary of State is not a judicial, but is an executive, officer, and is therefore not bound to hold an inquiry or give the person against whom he proposes to make a deportation order the opportunity of being heard.

RULES NISI for habeas corpus and certiorari directed respectively to the Inspector of Lemman Street Police Station and to the Secretary of State for Home Affairs.

On March 8, 1920, the Secretary of State for Home Affairs made the following order:—

"ALIENS RESTRICTION ACT, 1914.

"Order for the deportation of Samuel Venicoff alias Harris, alias Sunansky, alias Venis, an alien.

"In pursuance of the powers conferred by the Aliens Restriction Act, 1914, and art. 12 of the Aliens Order I hereby order that Samuel Venicoff alias Harris, alias Sunansky, alias Venis, an alien, shall be deported from the United Kingdom and shall remain thereafter out of the United Kingdom.

"And further I direct that from and after the service of this order upon the above-named alien he shall until he can be conveniently conveyed to and placed on board the ship on which he is to leave the United Kingdom, and whilst being conveyed to the ship and until the ship finally leaves the United Kingdom be in custody of the constable or other officer charged with the duty of enforcing this order."

In pursuance of that order Venicoff (hereinafter referred to

as "the applicant") was detained in custody. Thereupon he applied for these rules. In his affidavit he stated that he was born in Russia and came to this country with his mother over thirty years ago; that the only matters against him were certain convictions, when he was quite a lad; that with the exception of those convictions, for which he was sentenced to imprisonment with hard labour, he had led an honest life; that he had voluntarily enlisted with the view of fighting for the British, but was rejected as unfit; that in 1919 he instituted proceedings for divorce against his wife and a certain co-respondent, which proceedings were still pending; that in those proceedings a female witness, who was examined on behalf of the respondent before the Registrar, made a number of allegations against him, including one that when he went to South America in 1912 he went with his wife, whom he had not then married, who was to lead a life of prostitution for his benefit; that that allegation was absolutely untrue; that he was forced to the conclusion that a similar statement was made to the Home Secretary in the interests of his wife and the co-respondent with the view of getting him deported and thus defeat the ends of justice in the divorce proceedings; that he was not aware of the grounds upon which the deportation order had been made against him.

Upon that affidavit and certain others the rules were obtained upon the grounds: (1.) That on the true construction of art. 12, para. 1, of the Aliens Order, 1919 (1), the Secretary of State had no power to make a deportation order without giving the person affected an opportunity of knowing the grounds on which the order was made and/or the evidence or information relied on in support thereof and/or giving him a fair opportunity of meeting the same, none of which had been given to the applicant; (2.) that if the true construction of art. 12, para. 1, was not as above stated the article was *ultra vires*; and (3.) that there were no grounds upon which

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(1) Aliens Order, 1919, art. 12:
'(1.) The Secretary of State may, if
he deems it to be conducive to the
public good, make an order (in this

Order referred to as a deportation
order) requiring an alien to leave and
to remain thereafter out of the
United Kingdom. . . ."

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the Secretary of State could reasonably have deemed it to be conducive to the public good to make the deportation order.

On the return to the rules an affidavit by Sir John Pedder, an assistant secretary in the Home Office, was read. After setting out the convictions recorded against the applicant, including one in 1908 for obstructing the railway police, for which he was fined, the affidavit stated that from investigations made on behalf of the Home Office by the Criminal Investigation Department towards the end of 1919, there appeared to be strong ground for concluding that the applicant was then and had been leading an immoral life, living upon the earnings of his wife and another woman by prostitution, that in 1912 he had taken those two women to Buenos Ayres for the purpose of prostitution, and that he lived upon their immoral earnings there. On those facts the affidavit stated that it appeared to the Home Secretary that the applicant was a man against whom it was conducive to the public good that a deportation order should be made. Referring to the suggestion in the applicant's affidavit as to the allegations made against him in the divorce proceedings, Sir John Pedder stated that it was at any time open to the applicant to acquaint the Home Secretary with the circumstances, that every opportunity would have been afforded him of so doing, and that he had made no representations on the subject.

Branson (*Sir Gordon Hewart A.-G.* with him) showed cause. Art. 12, para. 1, in its original form, was held valid in *Rex v. Brixton Prison (Governor)*, *Ex parte Sarno* (1); *Rex v. Home Secretary, Ex parte Chateau Thierry (Duke)* (2); and *Rex v. Chiswick Police Station Superintendent, Ex parte Sacksteder*. (3) It did not then contain the words "if he deems it to be conducive to the public good," but the addition of those words does not imply an obligation on the Secretary of State to hold an inquiry before making a deportation order. He is an executive officer in this matter, and if for any reason he thinks it conducive to the public good to make an order he

(1) [1916] 2 K. B. 742.

(2) [1917] 1 K. B. 922.

(3) [1918] 1 K. B. 578.

is entitled to do so, and the Court cannot question the exercise of his discretion. [He also referred to *Attorney-General for Canada v. Cain* (1) and the Aliens Restriction (Amendment) Act, 1919.]

Compston K.C. and *Comyns Carr* in support of the rules. The rules should be made absolute. First, the use of the word "deems" in art. 12, para. 1, of the Aliens Order, 1919, implies that the Secretary of State shall hold an inquiry before making a deportation order and give the person against whom it is proposed to make it an opportunity of being heard: *Russell v. Russell*. (2) There Sir George Jessel M.R., referring to a case where the committee of a society was given a power of expulsion "if the committee shall at any time deem the conduct of any member suspicious," said that no one could suppose that it was left to the caprice of the members of the committee to stigmatize as dishonourable or dishonest any member of the society, and that the word "deem" showed that the committee must be satisfied by something like reasonable evidence, and after inquiry, that the member's conduct was unworthy. In *Board of Education v. Rice* (3) Lord Loreburn L.C. pointed out (4) that officers of State upon whom the duty of deciding questions was imposed by Parliament must act in good faith and judicially, giving an opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. The Home Secretary is for this purpose a tribunal and must act judicially. An opportunity of being heard was given in the case of persons interned under reg. 14B of the Defence of the Realm (Consolidation) Regulations, 1914; they could make representations to an advisory committee: see *Rex v. Halliday*. (5)

[EARL OF READING C.J. Recourse was allowed to that committee ex gratia. Further, the order against Zadig, the person against whom the internment order was made in *Rex v. Halliday* (5), was made before any intimation was given

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(1) [1906] A. C. 542.

(3) [1911] A. C. 179.

(2) (1880) 14 Ch. D. 471, 478-9.

(4) *Ibid.* 182.

(5) [1917] A. C. 260, 267.

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that representations could be made to the advisory committee. Here you are asking us to say that the deportation order is bad because no opportunity was given to the applicant to make representations before it was made.]

We do say so, relying strongly on Sir George Jessel's observations in *Russell v. Russell* (1) as to the meaning of the word "deem." In any event the applicant should be given the opportunity of making representations to the Home Office now. Secondly, such an order as this must be made by the Home Secretary in person: see *Rex v. Chiswick Police Station Superintendent, Ex parte Sacksteder* (2), and it does not appear that the order against the applicant was so made.

[AVORY J. That it was so made by the Home Secretary seems to be clear from Sir John Pedder's affidavit.]

Thirdly, if we are wrong as to the construction of art. 12, para. 1, we say that it is ultra vires because the Aliens Restriction Act, 1914, does not authorize the making of an order which has the effect of excluding the right of the person affected to be heard. It cannot be supposed that there was any desire to violate the principles of natural justice. [*Fisher v. Keane* (3) was referred to.]

Branson stated that he was authorized to say that the Home Secretary would consider any representations that might be made to him by the applicant in reference to the deportation order.

EARL OF READING C.J. In my opinion both these rules must be discharged. The Home Secretary having deemed it conducive to the public good that the applicant should be required to leave, and thereafter to remain out of, the United Kingdom, made a deportation order against him, and thereupon the applicant obtained these rules calling upon the Home Secretary and the Inspector of Leman Street Police Station to show cause why he should not be discharged from custody.

The power to make a deportation order is derived from art. 12 of the Aliens Order, 1919, made by virtue of the Aliens

(1) 14 Ch. D. 471, 478-9.

(2) [1918] 1 K. B. 578.

(3) (1878) 11 Ch. D. 353.

Restriction Act, 1914. That Act empowered His Majesty in Council to impose restrictions on aliens, and to make provision by order, inter alia, for the deportation of aliens. The Home Secretary having made a deportation order under art. 12, it has now been contended on behalf of the applicant that the order is invalid, first, because upon the true construction of art. 12 and in particular of the words therein "if he [the Home Secretary] deems it to be conducive to the public good," the Home Secretary could not make the order without holding an inquiry; and, secondly, that if that construction is not right the order is bad because art. 12 is ultra vires. In truth the whole case depends upon the meaning to be attributed to the words I have just quoted from art. 12.

Before I deal with the construction of art. 12 it is necessary to refer briefly to the facts. The applicant was convicted in 1901, 1902, and 1904 of offences for which he was sentenced to terms of imprisonment with hard labour. It is right to say that according to the evidence before us he was only between 17 and 20 years of age when he was convicted for those offences, and save for a trumpery offence in 1908 which requires no further consideration, no other convictions are recorded against him. Speaking for myself I have little doubt that if nothing else had been brought against him this deportation order never would have been made, but, apparently, there are divorce proceedings pending between the applicant and his wife and another person, and, according to his statement, during the course of evidence taken before the Registrar, charges were made against him of living on the immoral earnings of his wife and another woman, and of having in company with another man, taken those women to the Argentine in 1912 for the purpose of exploiting, and of deriving money from, their prostitution. If these statements are true they disclose as degrading a charge as can well be imagined. It seems that reports were made to the Home Secretary by the Criminal Investigation Department which indicate that, since the visit to the Argentine, the applicant had been, and was at the date of the order made against him, living upon the immoral earnings of women. If those allegations are true

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it cannot be argued that the Home Secretary was not amply justified in making the deportation order, assuming that he has power to make it. It is said, however, that these allegations were made against the applicant by persons interested in blackening his character for the purpose of prejudicing him in the divorce proceedings, and that the allegations are wholly untrue. It is right to say that, because that is the applicant's statement on affidavit. The Home Secretary does not express a concluded view that the allegations are true, but he says there is strong ground for thinking that the allegations are well founded, and there the matter is left. The applicant says he ought to have had an opportunity of making representations to the Home Secretary before this deportation order was made, or at least before it is put into operation. Sir John Pedder, on behalf of the Home Secretary, has stated that if the applicant had applied to the Home Office his representations would have been considered, but that no such application was made before the case came into Court. During the course of the hearing Mr. Branson has stated that the Home Secretary is ready to hear now any representation the applicant may make and notwithstanding the result of this case. That is only what we should expect, for the Home Secretary is merely concerned with coming to a conclusion for the public good.

Turning now to the statute, art. 12, and the deportation order made under it, I have no doubt that it is not for us to pronounce whether the making of the order is or is not conducive to the public good. Parliament has expressly empowered the Secretary of State as an executive officer to make these orders and has imposed no conditions. Under the Act of 1914 Parliament authorized the King in Council to make these regulations when a state of war exists between the King and a foreign power or where there is imminent national danger or a great emergency. Under the Aliens Restriction (Amendment) Act, 1919, that limitation contained in the Act of 1914 has temporarily disappeared, and the Secretary of State has power within one year from the passing of the Act of 1919 to make these orders at any time. The Act of 1919 is

not material in this case, and I only mention it because it was referred to in the course of the argument. That the Home Secretary has power to make a deportation order is in my opinion quite clear. Must he hold an inquiry before he makes it? That is the main point that has been argued. Mr. Compston, on behalf of the applicant, insisted that by reason of the use of the word "deems" in art. 12 the Home Secretary must act as a judicial tribunal, and, therefore, cannot make a deportation order without hearing the party against whom it is made; in other words, the Home Secretary must hold an inquiry. I cannot accept this argument. The Legislature in its wisdom took from the Courts during the war the power of inquiry into the facts of particular cases where orders were made under the Defence of the Realm Acts or the Aliens Order, and left the matter entirely to the judgment of the Home Secretary. As Lord Finlay L.C. said in dealing, in *Rex v. Halliday* (1), with reg. 14B made under the Defence of the Realm Consolidation Act, 1914—a different matter, but analogous to that with which we are concerned—"The duty of deciding this question"—as to the internment of a person of hostile origin and associations—"is by the order thrown upon the Secretary of State"; and I can find nothing in the observations of Sir George Jessel M.R. in *Russell v. Russell* (2) to lead us to the conclusion that the word "deems" in art. 12 is to be construed as if it meant that the Home Secretary can only come to a conclusion after he has held an inquiry. Sir George Jessel M.R. was referring in *Russell v. Russell* (2) to a different class of case—the right of a society to expel a member "if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society." It was said that in a case of that kind the committee must come to a conclusion only after holding an inquiry—after applying the maxim "*Audi alteram partem*." But in dealing with a regulation such as that with which we are now concerned the value of the order would be considerably impaired if it could be made only after holding an inquiry, because it might

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(1) [1917] A. C. 260, 269.

(2) 14 Ch. D. 471, 478-9.

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very well be that the person against whom it was intended to make a deportation order would, the moment he had notice of that intention, take care not to present himself and would take steps to evade apprehension. I therefore come to the conclusion that the Home Secretary is not a judicial officer for this purpose, but an executive officer bound to act for the public good, and it is left to his judgment whether upon the facts before him it is desirable that he should make a deportation order. The responsibility is his.

It was also contended that if upon the true construction of art. 12 the Home Secretary is not bound to hold an inquiry, the article is *ultra vires*, because it is against natural justice. I cannot agree, for the reasons I have already expressed. As soon as we come to the conclusion that this is an executive act left to the Home Secretary and is not the act of a judicial tribunal, the argument fails. In the exceptional circumstances of emergency that had arisen and led to the passing of this legislation Parliament considered that the matter should be left to the decision of an executive officer instead of to the ordinary tribunals. This has been discussed in a number of cases, and in particular in *Rex v. Halliday* (1), and it is sufficient to say that this emergency legislation and the power given thereunder enabling the executive to act quickly did not impose upon the executive the obligation to hold an inquiry. Parliament so enacted deliberately. Art. 12 is not *ultra vires*, and the order made under it is good. Both points taken for the applicant therefore fail.

AVORY J. I am of the same opinion. The applicant can succeed only if he can show that the order for his deportation was made without jurisdiction. It is not disputed that on its face it is perfectly good, and the only ground for suggesting that it was made without jurisdiction is the use of the word "deems" in art. 12, which it is contended implies that the Home Secretary must, before making an order, hold an inquiry and hear the person against whom he proposes to make the order. The only foundation for the argument that the word

(1) [1917] A. C. 260.

"deems" is to be so construed is the observation in *Russell v. Russell*. (1) Sir George Jessel M.R. there said: "I have to say a word as to the use of the word 'deem.' That word has more than one meaning, but one of its meanings is to adjudge or decide. In fact, the old word 'deemster' or 'dempster' was the name for judge. To 'deem' at one time meant to decide judicially. Consequently, taking that meaning, what they had to do was to 'deem' that the member's conduct was suspicious, and such as made him unworthy. That was in fact a decision not merely depending upon opinion, but depending on inquiry. No one could suppose it was to be left to the caprice of the members of the committee to stigmatize as dishonourable or dishonest any member of the society. Of course it was not. It was intended that they should be satisfied by something like reasonable evidence that his conduct was unworthy." But Sir George Jessel M.R. did not say that in every case where the word "deem" occurs in an Act of Parliament or Order in Council there must be a judicial determination. In my opinion the observations I have read have no application to the word as it occurs in art. 12; indeed, the phrase itself "if he [the Home Secretary] deems it to be conducive to the public good," is not consistent with the idea of an inquiry and a controversy between the parties. The matter is one entirely for the Home Secretary as an executive officer, and the whole foundation of the argument for the applicant fails. I will only add that the applicant's own affidavit, which seems to show little confidence in his legal submission, asks that the operation of the order should be postponed till after his proceedings for divorce, but that is not a matter with which this Court is concerned. I entirely agree with what the Lord Chief Justice has said.

ROCHE J. I agree.

Rules discharged.

Solicitors for applicant: *Raphael, Zeffertt & Co.*

Solicitor for respondents: *Treasury Solicitor.*

(1) 14 Ch. D. 471, 479.

J. S. H.

D

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Apr. 15 ;
May 6, 13, 21.ADAMS v. LONDON IMPROVED MOTOR COACH
BUILDERS, LIMITED.

[1919. A. 620.]

*Action—Costs—Retainer of Solicitors by Trade Union on behalf of Plaintiff—
Costs payable out of Fund to which Plaintiff Contributor—Right of Plaintiff
to recover Costs against Defendant.*

The plaintiff was a member of a Trade Union having, amongst other objects, that of providing legal aid for members in connection with their employment. The plaintiff had duly paid all his contributions to the Union and was entitled to the benefits. The Union's funds were allocated, amongst other objects, to that of providing the legal aid mentioned above. The usual practice was that when a dispute likely to lead to legal action occurred the proposed plaintiff wrote to the general secretary of the Union, and he, in turn, engaged a solicitor or (as in the present case), a firm of solicitors, on behalf of the plaintiff. The solicitors' costs were payable out of the Union's funds. Although the plaintiff gave no written retainer to them, the solicitors issued a writ on his behalf, took all the necessary steps to bring the action to trial, and instructed counsel during the preliminary stages and at the hearing of the action. The Union acted as the plaintiff's agent in retaining and instructing the solicitors, who accepted the retainer on the plaintiff's behalf and were entitled to be paid their costs out of the funds contributed to by him. In an action brought by the plaintiff against the defendants judgment was given for the plaintiff:—

Held, that the plaintiff was entitled to judgment with costs. *Gundry v. Sainsbury* [1910] 1 K. B. 645, where the solicitor had verbally agreed with his client, the plaintiff, that he, the client, should not pay the solicitor any costs, had no application, inasmuch as in the present case the solicitors were entitled to be paid their costs out of the fund contributed to by the plaintiff, and there was no arrangement to the contrary.

ACTION tried before Sankey J.

The action was brought for wrongful dismissal, and the plaintiff recovered judgment for 94*l.* 10*s.* An adjournment then took place for evidence and further argument upon the question whether the plaintiff was entitled to costs.

The facts were as follows: The plaintiff was a member of the National Union of Clerks, which was a trade union having amongst other objects that of providing legal aid for members in connection with their employment. The plaintiff had duly

paid all his contributions to the Union, and was entitled to the benefits. The Union's funds were allocated, amongst other subjects, to that of providing legal aid as aforesaid. The usual practice was that when a dispute likely to lead to legal action occurred the proposed plaintiff wrote to the general secretary of the Union, and he, in turn, engaged a solicitor or (as in the present case), a firm of solicitors, on behalf of the plaintiff. The solicitors' costs were payable out of the Union's funds. Although the plaintiff gave no written retainer to them the solicitors issued a writ on his behalf, took all the necessary steps to bring the action to trial, and instructed counsel both during the preliminary stages and at the hearing of the action. The learned judge found that the Union acted as the plaintiff's agent in retaining and instructing the solicitors, that the solicitors accepted the retainer and instructions on the plaintiff's behalf and were entitled to be paid their costs out of the funds contributed to by the plaintiff.

Kyffin for the plaintiff. There was no contract between the plaintiff and the solicitors who conducted the proceedings on his behalf that he should not pay any costs to them. Therefore *Gundry v. Sainsbury* (1) does not apply, and the plaintiff is entitled to recover his costs from the defendants. No retainer was given by the plaintiff to the solicitors because the National Union of Clerks was liable to them. But the plaintiff in effect paid the costs because he paid the Union. He provided the funds. He paid his Union for giving him legal aid. Instead of the solicitors being paid by the plaintiff and the plaintiff being repaid by the Union the solicitors went directly to the Union. The plaintiff is given an indemnity by law against costs because he paid the Union. He contributed to the fund which paid the costs.

Barrington-Ward K.C. and *David White* for the defendants. No retainer was given by the plaintiff to the solicitors. It must be admitted that if he had given a retainer to them it would be impossible to argue this case on his behalf. No retainer

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having been given by him, an action would not lie against him at the suit of the solicitors.

[*Henderson v. Merthyr Tydfil Urban Council* (1) was referred to.]

Kyffin in reply. The plaintiff in effect said to the Union: "I shall not give a retainer, but it is your duty to do it for me." The retainer by the Union was given on behalf of the plaintiff. The Union was the plaintiff's agent to give the retainer.

Cur. adv. vult.

May 21. The following judgment was read by

SANKEY J. In this case the plaintiff brought an action for wrongful dismissal and in the result recovered judgment for the sum of 94*l.* 10*s.* The learned counsel for the defendants then suggested that the plaintiff was not entitled to costs, apparently either because he was not under liability to pay any, or that it could not be proved that he had retained the solicitors who appeared for him. The case was adjourned in order that the position of the plaintiff in relation to his solicitors might be ascertained. Evidence was subsequently given on this point, and the facts are as follows. [The learned judge having stated the facts continued:] Learned counsel for the defendants quoted *Gundry v. Sainsbury* (2), the headnote of which is as follows: "A solicitor, who was acting for a client in a county court action in which the client was plaintiff, verbally agreed with him that he, the client, should not pay the solicitor any costs. At the trial of the action the jury returned a verdict for the plaintiff with damages. The county court judge, on the application of the defendant, entered judgment for the plaintiff for the amount of the verdict without costs on the ground that under the proviso to s. 5 of the Attorneys and Solicitors Act, 1870, the plaintiff was not entitled to recover from the defendant more costs than were payable by the plaintiff to his solicitor under the agreement:—*Held*, first, apart from the Act of 1870, that the plaintiff could not recover from the defendant

(1) [1900] 1 Q. B. 434.

(2) [1910] 1 K. B. 645.

more costs than he was liable to pay his solicitor, inasmuch as party and party costs were awarded as an indemnity only; secondly, upon the construction of the Act, that for the purpose of applying the proviso to s. 5 it was not necessary that the agreement should be in writing; consequently that the county court judge had rightly entered judgment for the plaintiff without costs," and relied upon the remarks of the Master of the Rolls, Cozens-Hardy M.R. (1): "What are party and party costs? They are not a complete indemnity, but they are only given in the character of an indemnity. I cannot do better than read the opinion expressed by Bramwell B. in *Harold v. Smith* (2): 'Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained.' " I am of opinion that *Gundry v. Sainsbury* (3) has no application to the present case. The facts there were entirely different. The solicitor in *Gundry v. Sainsbury* (3) had verbally agreed with his client, the plaintiff, that he, the client, should not pay the solicitor any costs. No such agreement was come to in the present case, the facts of which were that the solicitors were entitled to be paid their costs out of the fund contributed to by the plaintiff, and there was no arrangement to the contrary. The objection of the defendants is misconceived, and there must be judgment for the plaintiff with costs to be taxed in the usual way. The costs of the further argument to be taxed on the High Court scale, and the costs of advice on evidence to be allowed.

Solicitors for plaintiff: *Helliwell, Harby & Evershed*.

Solicitors for defendants: *White & Co*.

(1) [1910] 1 K. B. 649.

(2) (1860) 5 H. & N. 381, 385.

(3) [1910] 1 K. B. 645.

1919

[RAILWAY AND CANAL COMMISSION.]

Oct. 14 ;

Nov. 20, 21,
24, 25, 26,

27, 28 ;

Dec. 1, 2, 3,
4, 5, 8, 9.

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Mar. 16.

BUTTERLEY COMPANY, LIMITED, AND OTHERS, APPLI-
CANTS *v.* MIDLAND RAILWAY COMPANY, LONDON
AND NORTH WESTERN RAILWAY COMPANY,
AND LANCASHIRE AND YORKSHIRE RAILWAY
COMPANY, DEFENDANTS.

*Railway—Rates—Increase—Justification—Improvements in Conditions of
Employment—Whole Increase placed on “Exceptional Rate” Traffic—
Legality—Railway and Canal Traffic Act, 1913 (2 & 3 Geo. 5, c. 29), s. 1.*

By s. 1, sub-s. 1, of the Railway and Canal Traffic Act, 1913 : “ Where on a complaint with respect to any increase (within any limit fixed by an Act of Parliament, or by a Provisional Order confirmed by an Act of Parliament) of any rate or charge under section one of the Railway and Canal Traffic Act, 1894, the railway company proves to the satisfaction of the Railway and Canal Commissioners—

- (a) that there has been a rise in the cost of working the railway, excluding the cost of carrying and dealing with passengers, resulting from improvements made by the company since August 19, 1911, in the conditions of employment of their labour or clerical staff ; and
- (b) that the whole of the increase of the rates complained of is part of an increase made for the above purpose ; and
- (c) that the increase of rates is not, in the whole, greater than is reasonably required for the purpose ; and
- (d) “ that the proportion of the increase of rates or charges allocated to the particular traffic with respect to which the complaint is made is not unreasonable ; the Commissioners shall treat the increase of rate or charge as justified. . . . ”

The defendants in order to meet the increase in the cost of working their railways resulting from the improvements they had made in the conditions of employment of their labour and clerical staff in the form of higher wages, shortening the hours of labour, etc., placed an increase of 4 per cent. on all their “ exceptional rate ” traffic and nothing on the “ class ” traffic or on coal, coke and patent fuel. Almost all kinds of merchandise are carried at exceptional rates, so that practically no particular kind of merchandise was unaffected except coal, coke and patent fuel. The reason for this was that class traffic was already charged almost up to the maximum and the rates on coal, coke and patent fuel had already been raised more than once, and it was not thought advisable to disturb the recent arrangements that had been made :—

Held, that there had been no contravention by the defendants of the provisions of the sub-section, inasmuch as the word “ traffic ” in clause (d) referred to the class of goods—the particular industry—in which the

complainant was interested, and the object of the sub-section was to prevent one trader being unduly burdened by the increase of rates made, whereas the 4 per cent. increase on the exceptional rate traffic applied practically to all classes of goods and to all industries, and no complaint was made that any one industry or class of goods had been unduly burdened, nor was there any evidence of any hardship.

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APPLICATION to the Commissioners.

The applicants complained that the defendants had in exercise of the powers conferred on railway companies by the Railway and Canal Traffic Act, 1913, to raise their rates in order to meet the rise in the cost of working the railway (excluding passenger traffic) caused by the improvements which the companies had made since August 19, 1911, in the conditions of employment of their labour and clerical staff, raised a far larger sum than was justified. The applicants sought to recover, by way of damages, the excessive payments which they alleged they had been compelled to make in order to have their goods carried.

The applicants were manufacturers of pig iron and iron and steel goods. They owned and worked blast furnaces and limestone and other quarries, which were connected for the most part with the Midland Railway by private sidings.

The traffic (other than coal and coke) carried by railway to and from the applicants' respective ironworks consisted principally of ironstone, limestone, purple ore, sand, and scrap iron inwards, and pig iron, iron pipes and other castings and slag, and, in the case of the applicants the Butterley Co., Ltd., iron bars, angles, and sheets, iron and steel bridge work and roof work, tap cinder and flue cinder, outwards.

The traffic sent by railway from the limestone quarries was lime and limestone, and from the ironstone quarries, ironstone. All but a very small proportion of the applicants' traffic, both inward and outward, was carried at exceptional rates.

The defendants alleged that the increase of rates complained of was part of and in the same proportion as an increase of rates made on July 1, 1913, and reasonably required for the purpose of meeting a rise in the cost of working the railways of the defendants, excluding the cost of carrying and dealing with passengers resulting from improvements made by them

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since August 19, 1911, in the conditions of employment of the labour and clerical staff, and was justified under the provisions of s. 1 of the Railway and Canal Traffic Act, 1913, and/or that having regard to the services rendered and received and their value and the trouble and expense and responsibility attending the receipt, carriage and delivery of the applicants' traffic there had been a change of circumstances justifying the increase and the increase was reasonable.

The defendants in calculating the rise in the cost of working the railways, dealt with the problem in exactly the same way as the Great Northern Railway Co. in *Associated Portland Cement Manufacturers v. Great Northern Ry. Co.* (1), and as the Court in the present case held (following the decision of the Court of Appeal in the *Great Northern Railway Case* (1)) that the defendants had adopted a reasonable method and arrived at a reasonably correct result no further report upon that part of the case is considered necessary.

The defendants the Midland Railway Company and all the other railway companies in calculating the rise in the cost of working the railways resulting from the improvements they had made, and in deciding what increase to make in the rates and the classes of traffic on which to impose it, had adopted the same principle and made the same increase of rates on the same classes of traffic. They decided to put an increase of 4 per cent. on all their "exceptional rate" traffic and to put nothing on the "class" traffic or on coal, coke or patent fuel, and the question with which this report deals is whether by so doing they had infringed the provisions of s. 1, sub-s. 1 (d), of the Railway and Canal Traffic Act, 1913. As almost all kinds of merchandise are carried at exceptional rates, practically no particular kind of merchandise was unaffected except coal, coke and patent fuel. The reason for the defendants deciding to adopt this course was that class traffic was already charged almost up to the maximum, and the rates on coal, coke and patent fuel had already been raised more than once, and it was not thought advisable to disturb the recent arrangements that had been made.

Foote K.C., Rowland Whitehead K.C. and Edwin Clements for the applicants. Sect. 1, sub-s. 1 (*d*), of the Railway and Canal Traffic Act, 1913, precludes the defendants, even though the total increase of rates was reasonable, from throwing on to their exceptional rate traffic a larger proportion of the total increase than the exceptional rate traffic bears to the whole traffic. The defendants have to show that the proportion of the increase of rates allocated to the particular traffic is not unreasonable. It must be a proportion which the Court, comparing it with the proportion which the traffic affected bears to the whole traffic, shall say is not unreasonable. It must be within reasonable range of the two proportions, although not necessarily arithmetically accurate. In giving judgment in *Associated Portland Cement Manufacturers v. Great Northern Ry. Co.* (1) Lush J. said: "The second point is this: exceptional rate traffic forms a certain percentage of the whole, and it is said that the proportion, or ratio, that it bears to the whole is less than the proportion" which the amount thrown upon it bears to the whole expense incurred. "Although it may be true that the proportion is somewhat less, I think that the allocation is not unreasonable." Those words mean that the proportion may be somewhat less or somewhat more, but it must be reasonably near it. The fact that the defendants are unable to increase class rates does not make the proportion allotted to the exceptional rates reasonable. The meaning of s. 1, sub-s. 1 (*d*), of the Act of 1913 is that the proportion of the expenses imposed on the particular traffic by increasing the rate shall bear a reasonable proportion to the amount of that particular traffic as compared with the whole traffic—not a strictly mathematical proportion, but a reasonable proportion. The result of not being able to increase the class rates is that the railway companies—that is, the shareholders—must bear some portion of the burden. The words "particular traffic" in s. 1, sub-s. 1 (*d*), of the Act of 1913 mean the traffic on which the increase takes effect.

[LORD TERRINGTON. Do not the words "particular traffic"

(1) [1916] 2 K. B. 262, 272.

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mean one particular portion of the traffic—that is to say, not all that comes within the class of exceptional rates traffic, but that which comes within a particular trade—e.g., the cement trade ?]

It is true that if the complaint of the applicants were only in respect of cement traffic the words “particular traffic” would apply to that traffic. But the words of s. 1, sub-s. 1 (d), are “the particular traffic with respect to which the complaint is made,” which, in the present case, is all the exceptional rate traffic.

Sir John Simon K.C., Sir Lynden Macassey K.C., Eustace Hills K.C. and Arthur Moon for the defendants the Midland Railway Company.

Sir John Simon K.C., G. J. Talbot K.C. and Bruce Thomas for the defendants the London and North Western Railway Company.

Sir Lynden Macassey K.C. and J. B. Aspinall for the defendants the Lancashire and Yorkshire Railway Company.

Cur. adv. vult.

March 16, 1920. The following judgments were read by

MR. TINDAL ATKINSON K.C. I regret to say that owing to illness neither Lush J. nor Lord Terrington are able to be here to deliver their judgments in person, and they have asked me to read their judgments accordingly.

LUSH J. [The learned Commissioner then read the judgment. That portion of it which related to the construction of s. 1, sub-s. 1 (d), of the Railway and Canal Traffic Act, 1913, was as follows:] There remains only the question of construction of s. 1, sub-s. 1 (d), of the Act. As I have said Mr. Foote contends that the exceptional rate traffic on which the whole of the 4 per cent. increase of rate is imposed ought not to be made to bear more than its own proportion of the increased rate—i.e., its fair share having regard to the proportion which it itself bears to the whole traffic. He says that that is what the sub-section means when it says that the proportion

of the increase of rates or charges allocated to the particular traffic with respect to which the complaint is made is not unreasonable. If that view is right, if the class rates are up to their maximum, which a large part of them substantially are, a railway company could not raise the whole sum which the Legislature enabled them to raise in order to meet the rise in the cost of working. In my opinion it is clearly wrong. I think that the suggestion which Lord Terrington made during the argument—namely, that “traffic” in this sub-section refers to the class of goods, the particular industry in which the complainant is interested—is right, and that the sub-section was so framed as to prevent one trader being unduly burdened by the increase of rates that was made. The exceptional rate traffic applies practically to all classes of goods, to all industries in fact. The companies in effect curtailed the special advantages that all traders received by having goods carried at exceptional rates. No complaint is made here that one industry or one class of goods has been unduly burdened, and there is no evidence of any hardship. Mr. Foote based his argument on what I said in my judgment in the *Great Northern Case* (1), where I referred to the margin that the company had left unburdened by the 4 per cent. increase, and the ratio between the increased cost of working and the additional revenue, and compared it with the ratio between the exceptional rate traffic and other traffic. The language I there used does no doubt appear to support Mr. Foote’s argument. But I gave that answer to the argument in that case as being a sufficient one on those facts. It was no doubt unfortunate that I did not deal with it without regard to the facts of that case, as I have thought it necessary to do in this case. The point does not seem to have been taken in the Court of Appeal. But Lord Cozens-Hardy, in delivering the judgment of the Court of Appeal treated the whole of the margin of increased cost over additional revenue as being a “considerable margin for errors.” That view appears to me to negative any idea that the company had to bear that margin itself, and that the exceptional rate traffic could not

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(1) [1916] 2 K. B. 262, 272.

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be burdened with more than its proportion of the increase. In my opinion the contention of Mr. Foote is unsound. For these reasons I think that the application fails.

LORD TERRINGTON. I have given careful consideration to the evidence and arrangements presented to us in this case. The fundamental mistake made by the applicants' expert witness is that of ignoring the principles established by the decision of the Court of Appeal in the previous case (1) and of continuing to criticize the case presented to the Court as though no such decision existed. He admits that assuming that decision to be law, the method of presenting the case adopted by the defendants is not incorrect, though he challenges the accuracy of certain of their arithmetical calculations and deductions.

It would serve no useful purpose in these circumstances to go again through all the mass of detail, which has been dealt with so carefully and exhaustively by my Lord. I content myself by saying that having had the opportunity of reading the judgments of my learned colleagues I agree with them that this application fails.

MR. TINDAL ATKINSON K.C. I will now read my own judgment. [That portion of the learned Commissioner's judgment which related to the construction of s. 1, sub-s. 1 (d), of the Railway and Canal Traffic Act, 1913, was as follows :] I wish to add a word with regard to the construction of the statute. Mr. Foote's point, as I understand it, is that it was never contemplated that the whole amount of the increase should be put on one part of the traffic only, but that it was intended that the burden should be spread over the whole in proportion to the traffic carried, and that if, as in the present case, one portion of the traffic—namely, the class traffic—is already rated up to the maximum or practically so, the balance of the increase must be borne by the shareholders. I see nothing in the Act of 1913 which supports this view. The Act was passed to relieve the company from the increased burden and to place

(1) [1916] 2 K. B. 262, 292.

it on the shoulders of the traders. The company are not bound to bear any portion of the cost unless they think fit to do so.

Mr. Foote, in support of his proposition that the whole increase cannot be placed on one part of the traffic only, calls attention to the use of the word "proportion" in clause (d) of s. 1, sub-s. 1. That clause refers to an allocation "to the particular traffic with respect to which the complaint is made." That to my mind refers to the traffic or industry which is incident to the applicant's business, and if so the word "proportion" in that clause could only, at the most, be taken to show that the whole of the increase was never intended to be placed on any one industry. Subject to this, I think the company are entitled to put the whole or any part of the increase on any special section or branch of the traffic, limited only by their duty to show that such an allocation is not unreasonable. If this is the correct view, I think there can be no ground for saying that the conduct of the company in this case can be considered unreasonable. The only body available for the payment of the increase are the traders, and as the class rate traders are already rated up to the maximum, there is nothing for it but to call upon those who have hitherto escaped with lower rates to bear the burden of the increase.

I agree that this application fails.

Solicitors for applicants : *Thicknesse & Hull.*

Solicitors for Midland Railway Company : *Beale & Co.*

Solicitor for London and North Western Railway Company :

M. C. Tait.

Solicitor for Lancashire and Yorkshire Railway Company :

A. de C. Parmiter.

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Jan. 15, 16.

[IN THE COURT OF APPEAL.]

MUNRO, BRICE & COMPANY *v.* MARTEN.SAME *v.* THE KING.

[1918. M. 1601.]

[1919. M. 426.]

Insurance (Marine)—Perils of the Sea—"Free of capture and seizure" Clause—Insurance against War Perils—Unascertained Cause of Loss—Inference from Facts—Inference or Conjecture.

Decision in *Munro, Brice & Co. v. War Risks Association* [1918] 2 K. B. 78, overruled on an inference of fact.

APPEALS from two judgments of Bailhache J.

The first judgment was given in an action by the owners of a cargo of timber against underwriters of a policy of insurance against marine perils, excepting war perils. The second judgment was given upon a petition of right by the same owners as suppliants, who based their petition upon a certificate of insurance issued by the War Risks Insurance Office, a sub-department of the Board of Trade, insuring the same cargo against war perils. The action and the petition of right were independent of each other, but were heard together for the convenience of the parties concerned.

The cargo insured was loaded upon the sailing ship *Inveramsay* on a voyage from Gulf Port to Fleetwood. Both ship and cargo were lost, but whether by marine perils or by perils of war was uncertain. This question had already been decided by Bailhache J. in a former action—*Munro, Brice & Co. v. War Risks Association* (1)—in which the owners of the *Inveramsay* sued underwriters of policies against marine risks and war risks respectively for the loss of the ship on the same voyage. The learned judge held in that action that the shipowners had failed to prove a loss by war perils, and that, as the ship was lost on the voyage, the loss was caused by perils of the sea. In the cases now under appeal, after hearing certain evidence adduced in addition

(1) [1918] 2 K. B. 78.

to that given in the former case, the learned judge followed his decision in that case, and accordingly gave judgment in the action for the plaintiffs, the owners of the cargo, against the defendants, the marine risk underwriters, and dismissed the petition of right.

The defendants in the action and the suppliants in the petition of right appealed.

R. A. Wright K.C. and *Simey* for the defendants in the action.

Greaves Lord K.C. and *Clement Davies* for the plaintiffs in the action and suppliants in the petition of right.

Branson (*Sir Gordon Hewart A.-G.* with him) for the Crown.

THE COURT (Bankes, Scrutton and Atkin L.JJ.) after considering *Lindsay v. Klein*; *The Tatjana* (1), *Swansea Vale (Owners) v. Rice* (2), *Fleet v. Johnson* (3), *Kerr v. Ayr Steam Shipping Co.* (4) and *Bird v. Keep* (5) found that there was nothing likely to prevent a well-found ship like the *Inveramsay*, although she carried a deck cargo and met with some heavy weather on the voyage, from reaching an area off the coast of Ireland in which German submarines were actively operating. The Court agreed with Bailhache J. that if she had reached that area the inference that she was lost by war perils was to be drawn without hesitation, and held that the proper conclusion from the facts was that both ship and cargo were lost through war perils and not through perils of the sea. The appeals were allowed, and judgment was entered for the defendants in the action and for the suppliants in the petition of right.

Solicitors for defendants in the action : *William A. Crump & Son.*

Solicitors for suppliants : *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

Solicitor for the Crown : *The Treasury Solicitor.*

(1) [1911] A. C. 194.

(3) (1913) 6 B. W. C. C. 60.

(2) [1912] A. C. 238.

(4) [1915] A. C. 217.

(5) [1918] 2 K. B. 692.

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[IN THE COURT OF APPEAL.]

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Oct. 30, 31.

FLANNAGAN *v.* SHAW.

Statute—Repeal by Implication—Subsequent Act—Emergency Legislation—Inconsistency—Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 18—Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), s. 1, sub-s. 1.

By s. 18 of the Distress for Rent Act, 1737: "In case any tenant . . . shall give notice of his . . . intention to quit the premises by him . . . holden at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then the said tenant . . . shall from thenceforward pay to the landlord . . . double the rent or sum which he . . . should otherwise have paid."

By s. 1, sub-s. 1, of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915: "Where the rent of a dwelling-house to which this Act applies . . . is hereafter during the continuance of this Act, increased above the standard rent . . . as hereinafter defined, the amount by which the rent . . . payable exceeds the amount which would have been payable had the increase not been made shall . . . be irrecoverable":—

Held, that the earlier enactment not being inconsistent with the later, was not repealed or suspended thereby.

Judgment of a Divisional Court (1) reversed.

APPEAL from the judgment of a Divisional Court (1) on appeal from the County Court of Staffordshire holden at Dudley.

The defendant was tenant to one Davies of a house at Dudley on a quarterly tenancy at a rent of 20*l.* a year, subject to a quarter's notice to quit on either side. In December, 1917, the defendant bought another house, and on December 24 he gave notice to Davies that he would give up his tenancy on the following Lady Day. In February, 1918, Davies sold the reversion on the tenancy to the plaintiff, Mrs. Flannagan. At Lady Day the defendant, being unable to get vacant possession of the house he had bought, refused to give up the house he had held of Davies. The plaintiff required this house for her own occupation, but was unable to get an order for possession because of s. 1, sub-s. 3, of the

(1) [1919] W. N. 139.

Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, as amended by s. 1 of the Increase of Rent, &c. (Amendment) Act, 1918.

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In December, 1918, the plaintiff brought this action under s. 18 of the Distress for Rent Act, 1737 (1), claiming that he

(1) Distress for Rent Act, 1737 (11 Geo. 2, c. 19), s. 18: "And whereas great inconveniencies have happened and may happen to landlords whose tenants have power to determine their leases, by giving notice to quit the premises by them holden, and yet refusing to deliver up the possession when the landlord hath agreed with another tenant for the same; Be it further enacted . . . that . . . in case any tenant . . . shall give notice of his . . . intention to quit the premises by him . . . holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained; that then the said tenant . . . shall from thenceforward pay to the landlord . . . double the rent or sum which he . . . should otherwise have paid, to be levied, sued for and recovered at the same times and in the same manner as the single rent or sum, before the giving such notice, could be levied, sued for, or recovered; and such double rent or sum shall continue to be paid during all the time such tenant . . . shall continue in possession as aforesaid."

Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), s. 1: (1.) "Where the rent of a dwelling house to which this Act applies . . . is hereafter during the continuance of this Act, increased above the standard rent . . . as hereinafter defined, the amount by which the rent . . . payable exceeds the amount which would have been payable had the increase not been

made shall, notwithstanding any agreement to the contrary, be irrecoverable: Provided," etc.

(3.): "No order for the recovery of possession of a dwelling-house to which this Act applies or for the ejectment of a tenant therefrom shall be made so long as the tenant continues to pay rent at the agreed rate as modified by this Act and performs the other conditions of the tenancy, except on the ground that the tenant has committed waste or has been guilty of conduct which is a nuisance or an annoyance to adjoining or neighbouring occupiers, or that the premises are reasonably required by the landlord for the occupation of himself or some other person in his employ, or in the employ of some tenant from him, or on some other ground which may be deemed satisfactory by the Court making such order. . ."

Increase of Rent, &c. (Amendment) Act, 1918 (8 Geo. 5, c. 7), s. 1. "Sub-s. 3 of s. 1 of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, shall have effect as if at the end thereof the following provision was inserted: 'For the purposes of this sub-section the expression "landlord" shall not include any person who since the thirtieth day of September, 1917, has become landlord by the acquisition of the dwelling-house or any interest therein otherwise than by the devolution thereof to him under a settlement made before the said date, or under a testamentary disposition or an intestacy.' . . ."

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was entitled to double the amount of the rent for the period between Lady Day and Michaelmas, 1918, during which the defendant had held over after the expiry of his notice to quit. The defendant was ready and willing to pay rent at the rate of 20*l.* a year, and had paid at that rate up to June 24, 1918, but insisted that he was relieved from liability for any further sum by s. 1, sub-s. 1, of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915. (1)

The county court judge gave judgment for the plaintiff for the amount of the double rent claimed. The defendant appealed, and the Divisional Court (Horridge and Bailhache JJ., the latter doubting) entered judgment for the defendant.

The plaintiff appealed.

Disturnal K.C. and *R. A. Willes* for the appellant. The question is whether s. 18 of the Distress for Rent Act, 1737, has been repealed or suspended by s. 1 of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915. The earlier enactment allows a landlord to recover a penal sum equal to twice the rent if a tenant, after having given notice to quit, wrongfully refuses to give up possession when the time comes for leaving. This is a sum intended to reimburse the landlord for any injury he may sustain by losing his bargain with a new tenant: *Johnstone v. Hudlestone*. (2) The sum is not rent. It is not so described. It is described as "double the rent or sum which he"—who was the tenant—"should otherwise have paid." It is only payable while he remains in possession after the term has come to an end. It is not accurate to say it is payable by a tenant, because, the tenancy having come to an end, there is no tenant. No new tenancy is created by the payment of this sum: *Booth v. Macfarlane*. (3) If it was rent it would be recoverable as rent without an express enactment to make it so. It cannot therefore be said that when

(1) See note 1 ante.

(2) (1825) 4 B. & C. 922.

(3) (1831) 1 B. & Ad. 904.

a landlord of a dwelling-house claims or exacts this sum, the rent of the dwelling-house is increased. Sect. 1, sub-s. 1, of the Act of 1915 only applies when it can be truly said that the rent of the dwelling house is increased. That Act was passed with a particular object. During the war the demand for housing accommodation began to exceed the supply, and landlords began to raise the rent of small tenements held on short tenancies and to evict the tenants if they would not pay the increased rent. This bore hardly on the tenants who could not pay and who, when evicted from their houses, could not find accommodation elsewhere. Therefore it was enacted by s. 1, sub-s. 1, of the Act of 1915, that where the rent of a dwelling house to which the Act applied was increased above a certain amount called the standard rent, ascertainable as provided by the Act, the amount of the increase should not be recoverable; and by sub-s. 3 it was enacted that, except in certain circumstances, which it is unnecessary to state, no order for possession should be made against a tenant so long as he continued to pay the standard rent and to perform the other conditions of the tenancy. This Act contemplates a tenancy, a landlord, and a tenant; a rent payable by agreement on a demise, express or implied; and the tenant desirous of continuing in occupation, and the landlord wishing to realize the enhanced value of his property and threatening eviction unless an increased rent is paid. It cannot be said that an Act preventing the landlord in these circumstances from increasing the rent is inconsistent with an Act contemplating a tenancy already determined by the former tenant by notice to quit; where there is therefore no landlord and no tenant, but where he who was the tenant but is now a mere trespasser refuses to deliver up possession, and the former landlord is seeking recompense for loss of his bargain which, relying on the former tenant's notice to quit, he has made with a new tenant. If the two Acts are not inconsistent the latter does not repeal the earlier. [*Crook v. Whitbread* (1) was also cited.]

J. F. Eales (*J. G. Hurst K.C.* with him) for the respondent.

(1) [1919] W. N. 185; 88 L. J. (K. B.) 959.

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For the purpose of s. 1, sub-s. 1, of the Act of 1915 it matters not whether the tenancy is determined by the act of the landlord or by the act of the tenant. If after having given notice to quit the tenant remains in possession after the term has come to an end, he remains as tenant on sufferance and is a tenant within the meaning of the Act: *Artizans' Dwellings Co. v. Whitaker*. (1) Sect. 1, sub-s. 3, of the Act keeps the tenancy on foot so long as the tenant continues to pay rent at the agreed rate as modified by the Act. By s. 1, sub-s. 1, any increase over and above that rent is irrecoverable. It cannot have been intended by the Legislature that in face of those provisions the landlord may exact double the rent. The word "rent" should not receive too strict an interpretation in a remedial statute like the Act of 1915. It means anything paid for use and occupation of the tenement. The Acts of 1915 and 1737 cannot stand together, and while the later Act stands the earlier must be suspended.

Counsel for the appellant were not called upon to reply.

BANKES L.J. This appeal must be allowed. The defendant was tenant to one Davies; the rent was payable quarterly and either party might give the other a quarter's notice to determine. In December, 1917, the defendant gave his then landlord, Davies, notice to determine the tenancy on the March quarter day. After receiving that notice Davies sold the freehold of the demised premises to the plaintiff. When the March quarter day arrived the defendant refused to leave the premises, and the plaintiff claimed double rent under s. 18 of the Distress for Rent Act, 1737. The matter came before the county court judge, and, though the point does not seem to have been taken formally, the defendant, who then conducted his case in person, conveyed to the judge the contention that the earlier Act of 1737 had been repealed or suspended by the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915. The county court judge took the view that the Acts had nothing to do with each other,

(1) [1919] 2 K. B. 301.

and he decided against the defendant, who appealed to the Divisional Court. From the report to which we have been referred it appears that Horridge J. thought the defendant was right but that Bailhache J. took the opposite view. He did not however formally dissent and so the appeal was allowed and now the plaintiff appeals to this Court.

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The only point is whether the respondent is right in his contention that the earlier statute has been repealed or suspended by the later. The question how far a later statute repeals an earlier is the subject of a well-settled rule upon the construction of statutes, and two decisions lay down the rule in clear terms. In *Hill v. Hall* (1) Cleasby B. refers to Dwaris on Statutes (2) where the following passage occurs : "Every affirmative statute is a repeal of a precedent affirmative statute, where its matter necessarily implies a negative ; but only so far as it is clearly and indisputable contradictory and contrary to the former Act in the very matter (3), and the repugnancy such that the two Acts cannot be reconciled." Another view of the same question is expressed by Lord Selborne L.C. in *Seward v. Vera Cruz* (4) : "Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." Applying those principles to this case, what is the subject specially dealt with by s. 18 of the Distress for Rent Act, 1737 ? A tenant who has given to his landlord notice to terminate the tenancy, a notice which the landlord is bound to accept, and who having given that notice refuses to leave the tenement. That is the person and those are the circumstances dealt with in that Act. Clearly the

(1) (1876) 1 Ex. D. 411.

(3) Dwaris cites *Foster's Case*

(2) 2nd ed. (1848), pp. 530, 531.

(1614) 11 Rep. 56b.

(4) (1884) 10 App. Cas. 59, 68.

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Legislature had in view an aspect of the relation of landlord and tenant very different from that contemplated by the Act of 1915. The Act of 11 Geo. 2, c. 19, is intituled "An Act for the more effectual securing the payment of rents, and preventing frauds by tenants"; and s. 18 opens with a recital: "And whereas great inconveniencies have happened and may happen to landlords whose tenants have power to determine their leases, by giving notice to quit the premises by them holden, and yet refusing to deliver up the possession when the landlord hath agreed with another tenant for the same," and proceeds to enact that in case any tenant shall give notice of intention to quit the premises by him holden at a time mentioned in the notice, and shall not accordingly deliver up the possession thereof at the time contained in the notice, then the tenant shall from thenceforward pay to the landlord "double the rent or sum which he . . . should otherwise have paid, to be levied, sued for, and recovered at the same times and in the same manner as the single rent or sum, before the giving such notice, could be levied, sued for, or recovered; and such double rent or sum shall continue to be paid during all the time such tenant . . . shall continue in possession as aforesaid." It was argued that both statutes deal with the same subject-matter—namely, rent: I doubt whether the earlier statute does deal with rent properly so called. It seems to me rather to refer to a penal sum to be calculated by reference to the rent and to be paid by the tenant so long as he wrongfully holds the demised premises after having given notice to quit. The section does not in the first instance use the words "double rent"; it speaks of "double the rent or sum which" the tenant "should otherwise have paid." Moreover the original rent in this case was payable quarterly; it might have been half-yearly, or yearly; but the section of the Act goes on to provide that "such double rent or sum shall continue to be paid during all the time such tenant . . . shall continue in possession," that is to say not quarterly, half-yearly, or yearly, but only so long as the tenant continues in possession. Again this section deals with the particular case of a tenant

who has himself given notice to quit and then stays on after the notice has expired and against the will of the landlord.

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What is the statute which is said to repeal that section? It is an enactment dealing with an entirely different state of things. The action of landlords either in ejecting their tenants or increasing the rent is the mischief aimed at by the Act of 1915. I can see no ground for suggesting that the state of things remedied by the Act of 11 Geo. 2, c. 19, was intended to be touched at all by the Act of 1915. We must gather the intention of Parliament from the language used in the Act. The Act shows clearly the circumstances with which the Legislature is dealing; it is not for us to speculate as to what its intention would be in another set of circumstances. Counsel for the respondent relied upon s. 1, sub-s. 3, of the Act of 1915, and contended that there was some inconsistency in protecting a tenant from ejectment so long as he continues to pay rent at the agreed rate as modified by the Act, and at the same time allowing the landlord to recover double rent perhaps for months while the tenant remains in possession after giving notice to quit. But I see nothing inconsistent in this. It may be that the landlord cannot eject the tenant, but that, having regard to the action of the tenant, the Legislature has allowed the landlord double rent so called as long as the tenant chooses to persist. Then it was argued that the case falls within s. 1, sub-s. 1, of the Act of 1915. This argument is based on the assumptions, first, that the penal sum mentioned in the Act of 11 Geo. 2, c. 19, is rent within the meaning of s. 1, sub-s. 1, of the later Act, and, secondly, that when the landlord takes advantage of the provision in the Act of 1737 the rent is thereby increased within the meaning of the later Act. I do not accede to either assumption. I do not think the penal sum specified in the Act of 1737 is rent within s. 1, sub-s. 1, of the Act of 1915, nor do I think that, when a landlord takes advantage of the provision in s. 18 of the Act of 1737, the rent of the dwelling house is thereby increased within the meaning of the later enactment. In my opinion the defence is not well

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1919 must be allowed.

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SCRUTTON L.J. I am of the same opinion. A tenant who had power to terminate the tenancy by a quarter's notice has himself given notice to terminate it on March 25, 1918. No one obliged him to do this. He thought it would suit him to do so, and he gave the notice for his own convenience. The landlord, believing that the tenant meant what he said, entered into a contract to do that which he could not do unless the tenant went out. When the day came for giving up possession the tenant found himself in a difficulty, and so, regardless of the inconvenience he was causing, he elected to stay on. The landlord points to the Act of 11 Geo. 2, c. 19, s. 18, as entitling him in express terms to claim a penal sum equal to double the rent which the tenant should otherwise have paid; and he claims that sum. The Act is still in force. It recites that "great inconveniencies have happened and may happen to landlords, whose tenants have power to determine their leases by giving notice to quit the premises by them holden, and yet refusing to deliver up the possession, when the landlord hath agreed with another tenant for the same." That is an exact recital of the facts of this case. This tenant had power to determine his lease by giving notice to quit the premises by him holden, and yet refuses to deliver up the possession, when the landlord hath agreed with another tenant for the same. To remedy this inconvenience the Act provides that in case any tenant shall give notice of his intention to quit the premises by him holden at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then the said tenant shall from thenceforward pay to the landlord double the rent or sum which he should otherwise have paid; to be levied, sued for and recovered at the same times, and in the same manner, as the single rent or sum before the giving such notice could be levied, sued for or recovered; and such double rent or sum shall continue to be paid, during all the time such tenant shall continue in possession as

aforesaid. It ceases to become payable when he goes out. It is obviously a penal sum. Beyond all question this case falls within that enactment unless it has been repealed. Counsel for the respondent preferred the word "suspended"; but suspended means temporarily repealed. There is no express repeal in the way with which we are all familiar. Therefore the question is, Does the Act of 1915 impliedly repeal the earlier enactment? Two authorities have been cited by Bankes L.J. I have looked at two others. In *Foster's Case* (1) this passage occurs: "Only it must be known, that forasmuch as Acts of Parliaments are established with such gravity, wisdom and universal consent of the whole realm, for the advancement of the commonwealth, they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated: sed hujusmodi statuta tanta solennitate et prudentia edita (as Fortescue speaks, cap. 18, fol. 21) ought to be maintained and supported with a benign and favourable construction." Then follow cases where general statutes were held not to repeal express ones. Next I would refer to the words of A. L. Smith J. in *Kutner v. Phillips* (2): "Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim '*Leges posteriores contrarias abrogant*' (3) applies. Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together." Apply that principle; a particular Act deals with the case where a tenant gives notice to quit and the landlord acting upon that notice lets the tenement to another person. What is the general enactment so inconsistent with that as to make it impossible for the two to stand

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(1) 11 Rep. 56*b*, 63*a*.

(2) [1891] 2 Q. B. 267, 271, 272.

(3) *Leges posteriores priores contrarias abrogant*: 2 Inst. 685.

C. A. together ? Sect. 1, sub-s. 1, of the Act of 1915 was passed
1919 to deal with this state of things : there were many small
FLANNAGAN tenancies which could be terminated by a week's notice at
v. a time when houses and lodgings were very hard to find.
SHAW. Landlords were taking advantage of these conditions to exact
Scrutton L.J. a higher rent or evict the tenant. The tenant was ready
to pay the old rent ; he did not want to go ; but the landlord
would not allow him to remain except at an increased rent,
which he was obliged to pay, because if he was evicted he
could not find accommodation elsewhere. In these cir-
cumstances the Act of 1915 was passed. Sect. 1, sub-s. 1,
provides that where the rent of a dwelling-house to which
the Act applies is during the continuance of the Act increased
above the standard rent as defined by the Act, the amount
by which the rent payable exceeds the amount which would
have been payable if the increase had not been made shall
be irrecoverable. That can receive a legitimate interpretation
if applied to a tenant who is ready to remain a tenant ; if
he performs the conditions of the tenancy the rent is not to
be raised ; any attempted increase is not to be recoverable.
It shows no disrespect to Parliament to say that this statute
might have been passed without any thought of the case
where the tenant desiring to leave gives notice to quit, and the
landlord relying on the notice takes action which will involve
him in difficulties if the tenant changes his mind. That case
is quite distinct from the case where the tenant has all along
desired to remain and is being threatened with eviction as
a means of extorting a higher rent. Applying the principles
above laid down it seems to me that the respondent does not
show that the particular enactment of 11 Geo. 2, c. 19, s. 18, is
abrogated by the general words of the Act of 1915 addressed
to an entirely different set of circumstances. That is all we
need decide in this case. I give no opinion on the nature of
the double sum or rent recoverable under the Act of 1737.
The judgment of the county court judge was right. The
Divisional Court was wrong. The appeal must be allowed
and judgment entered for the appellant.

I should like to add that by s. 17 of the Appellate

Jurisdiction Act, 1876, and Order LIX., r. 1 (c), of the Rules of the Supreme Court, 1883, an appeal from a county court ought to be decided by two judges and not by one judge only. In this case Bailhache J. seems to have thought that the judgment of the county court judge was right, and yet the appeal was allowed. I regret that this course was taken. It would have been otherwise if the judgment had been affirmed, but as it is it seems to have been overruled without the necessary concurrence of two judges of the High Court.

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DUKE L.J. I agree. I cannot help thinking that if the Legislature had intended to repeal the Act of 1737 it would have said so. It is not a statute that has been recalled from the limbo of obsolete law. It is a statute well known to all who are familiar with the law of landlord and tenant. In my view it was not the intention of Parliament to limit the rights of landlords so strictly as the respondent suggests.

If the question had turned on my individual opinion I should have been inclined to say no more. But as this is an appeal from another Court I will add a few words. The scheme of the Act of 1915 is to limit or moderate the powers of landlords in certain specific cases and to confirm tenants in possession of their holdings. Now an enactment which benefits one class of His Majesty's subjects at the expense of another must be construed with some reasonable degree of strictness. This Act prevents landlords in certain cases from ejecting their tenants or increasing the rent of the tenement; it does not purport to allow a tenant who has determined the tenancy of his own accord to revive it again at his sole will and pleasure. There is no glimmer of any such intention. The intention of an Act can only be inferred from what has been expressed. This statute expressly enacts that where a tenancy exists the rent shall not be increased beyond the prescribed limits. How can the Court infer from that enactment an intention to alter the law where no tenancy exists, where there is no landlord and no tenant and no obligation to pay rent?

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Duke L.J.

It was argued that an increase of rent was in effect permitted by the Act of 1737, which deals with tenants who, having unreservedly determined their tenancies, refuse to give up possession, because the sum to become due from the tenant so long as he chooses to remain in possession is treated as rent. The Legislature, it is said, has used language consistent with the view that it is rent. Any lawyer can see that it is not rent within the meaning of the Act of 1915; it is a penal sum which the former tenant has to pay for the inconvenience and loss he causes his landlord so long as he persists in detaining possession from him. Mr. Eales contended that s. 1, sub-s. 3, treats the anomalous relation it creates between the parties as that of landlord and tenant, and the sum payable by the latter to the former as rent. Perhaps it does, but its provisions are limited to cases where the landlord is minded to eject an existing tenant, which is not this case. The short answer to the respondent's contention is to be found in the plain words of the Act of 1915. The present case is not within the provision made by the Legislature in that Act. Therefore the liability imposed by s. 19 of the Act of 1737 remains unaffected. The question whether the two Acts can co-exist does not in truth arise. If it did the answer would be that the two enactments might be written in one statute without the one influencing the other in the least. The appeal must be allowed.

I share the view of Scrutton L.J. that it was not the intention of the Legislature that the judgment of a county court judge should be overruled by one judge in the High Court, which seems to have happened in this case.

Appeal allowed.

Solicitors for appellant: *Mills, Curry & Gaskell, for F. W. Green, Dudley.*

Solicitors for respondent: *Peacock & Goddard, for Duggan & Elton, Birmingham.*

W. H. G.

[IN THE COURT OF APPEAL.]

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1920

POLE-CAREW AND ANOTHER, APPELLANTS *v.* CRADDOCK
(Surveyor of Taxes), RESPONDENT.

Mar. 19, 24,
25.

Revenue—Income Tax—Ferry—Exemption—Future Imperial Tax—30 Geo. 3, c. 61, ss. 15, 20—Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, Sch. A, No. III., r. 3—Revenue Act, 1866 (29 & 30 Vict. c. 36), s. 8—Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 59, sub-s. 4.

A ferry was established by and maintained under an Act of 1790 (30 Geo. 3, c. 61), which was to be deemed to be a public Act, and contained a provision that the then proprietors, or their respective heirs or assigns, “shall not be rated or assessed for or toward the payment of any tax, rate, or assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry. . . .” :—

Held, that the exemption granted by the statute extended to parliamentary taxes whether in existence at the date of the Act or not, and therefore included income tax, although that tax was first imposed subsequently to the passing of the Act of 1790.

Principle established by *Associated Newspapers v. City of London Corporation* [1916] 2 A. C. 429 applied to Imperial taxes.

Decision of Rowlatt J. [1919] 2 K. B. 393 affirmed.

APPEAL from a decision of Rowlatt J. (1) on a case stated under the provisions of s. 59 of the Taxes Management Act, 1880, by the Commissioners for the General Purposes of the Income Tax Acts for the East South Division of Cornwall.

At a meeting of the Commissioners held on December 6, 1917, the appellants, Sir Reginald Pole-Carew and the Right Honourable John Townshend, Lord St. Levan, proprietors of the Torpoint Ferry, appealed against an assessment of 4000*l.* made upon them under s. 60, Sch. A., No. III., r. 3, of the Income Tax Act, 1842, and s. 8 of the Revenue Act, 1866, for the year ending April 5, 1917, and an assessment for 4000*l.* for the year ending April 5, 1918, in respect of the profits of the ferry.

The Torpoint Ferry belonged as regards a three-fourths share to Lieut.-General Sir Reginald Pole-Carew, and the remaining one-fourth share to Lord St. Levan, and was

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conducted in the manner set forth below. The profits of the ferry, which were substantial, were divided in the above proportions between the proprietors. The ferry had never been assessed to any local rate or to land tax. So far as could be traced the profits of the ferry had always been assessed to income tax since it was imposed, and liability to the same had never previously been disputed in principle.

It was not disputed that, if the profits of the ferry were liable to assessment to income tax, the duty payable down to April 5, 1916, had been correctly computed and levied. The duty for 1916-7 and 1917-8 had been estimated, and it was agreed between the parties that any necessary adjustment of the figures should stand over pending settlement of the general question as to the existence of any liability.

Before 1918 ferries were assessable under r. 3 of No. III. of Sch. A., s. 60, of the Income Tax Act, 1842, and s. 8 of the Revenue Act, 1866; but are now assessable under r. 3 of No. III. Sch. A of the Income Tax Act, 1918. The Torpoint Ferry was established by and was maintained under an Act 30 Geo. 3, c. 61. The title of the Act described it as an Act for authorizing and enabling "the Right Honourable George Earl of Mount Edgcumbe, and Reginald Pole Carew, Esquire, to establish and maintain a common ferry across the river Tamer." The preamble recited that: "Whereas the parishes of Stoke Damarel, in the county of Devon, and Antony Saint Jacob, otherwise Antony in the East, in the County of Cornwall, are situated nearly opposite to each other, upon the great navigable river called the Tamer, and contain several towns, villages, or hamlets (particularly Plymouth Dock, in the said county of Devon and Torpoint in the said County of Cornwall), which have become very populous, and places of considerable resort whereby a constant intercourse is occasioned between the inhabitants of the said parishes; and whereas the establishing and maintaining of a common ferry . . . will not only be of great and permanent utility and convenience to the inhabitants of both parishes, as well as to those of other parts of the said several counties, but will be of public benefit: And whereas

the Right Honourable George Earl of Mount Edgcumbe and Reginald Pole Carew Esquire, are ready and willing " to establish and maintain a ferry " on being authorized and allowed by Parliament to demand and receive reasonable rates for passage and conveyance be it enacted that the said George Earl of Mount Edgcumbe and Reginald Pole Carew, and their respective heirs and assigns shall be, and are hereby authorized, enabled, and impowered, to establish, keep, and maintain a common ferry from a piece or parcel of vacant ground in the said parish of Stoke Damarel over and across the said River Tamer to a piece or parcel of ground now used as a common landing place at Torpoint aforesaid. . . . " Sect. 2 of the Act granted powers to dredge and do any constructional work necessary for the ferry " and from time to time and at all times hereafter to do all other matters and things necessary and convenient for establishing, maintaining, improving, perfecting, regulating, and managing the said ferry, and making the same as useful and advantageous as may be." Sect. 14 vested the sole right and property in the ferry, and land, houses, etc., in Lord Mount Edgcumbe and Reginald Pole-Carew as tenants in common their respective heirs and assigns for ever. Sect. 15 (to which the sidenote was : " Ferry not to be rated ") enacted : " And forasmuch as the establishment and maintenance of the said intended ferry will be for the convenience and advantage of the public ; and the said George Earl of Mount Edgcumbe and Reginald Pole Carew, and their respective heirs or assigns, will be put to a considerable charge and expense in and about the same, be it therefore enacted, that the said George Earl of Mount Edgcumbe and Reginald Pole Carew, or their respective heirs or assigns, shall not be rated or assessed for or toward the payment of any tax, rate, or assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry, or the tolls, rates, or duties payable in respect thereof, and the boats, vessels, or landing-places thereto belonging."

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Sect. 20 enacted that : " this Act shall be deemed, adjudged, and taken to be a public Act ; and shall be judicially taken

C. A. notice of as such, by all judges, justices, and other persons
1920 whatsoever, without being specially pleaded." The Act had
POLE-CAREW not since been modified either by Act of Parliament or
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In pursuance of the Act the Earl of Mount Edgcumbe and Mr. Reginald Pole-Carew duly established the ferry, and the ferry had since been continuously carried on by them and their successors in title, and was now being carried on by the present proprietors under and in accordance with the provisions of the Act. Immediately after the passing of the Act certain land on the Devonport side was converted into a canal and landing places on both sides of the river were constructed. Two boats were provided for passengers and two boats for animals and vehicles rowed by men across the ferry.

Some time after 1790 an interest in one-fourth of the ferry was conveyed to Sir John St. Aubyn. In 1802 the Earl of Mount Edgcumbe sold all his interest in the ferry to the said Reginald Pole-Carew, then the Right Honourable Reginald Pole-Carew. In 1827 further land was granted by the officers of the Board of Ordnance to Reginald Pole-Carew and Sir John St. Aubyn to enable the ferry to be worked by steam and to improve the landing stage, and in or about 1834, at an additional expense of several thousand pounds, an improved mode of crossing was established by means of a boat or bridge propelled by steam on two chains laid across the river. In or about 1890, at very considerable expense, the ferry canal was filled up and a new landing place was constructed upon the site of the canal, the War Office having given the proprietors notice to quit the landing stage previously used.

The ferry was now worked by means of steamboats running on chains with the addition of two steam launches plying within the limits of the ferry. The boats which ran on chains ran every half-hour from 5.30 A.M. to 9.30 P.M., the steam launches ran every quarter of an hour from 7.45 A.M. to 11.30 P.M.

Both at the time of the passing of the Act 30 Geo. 3, c. 61,

and at the present time the ferry formed part of the main highway from Plymouth and south and west of England into Cornwall. In 1790 the main road from London to Truro and Penzance was via Plymouth, and the London mails on coaches crossed at Torpoint. The coaches used this road until they ceased to run on the Cornish railway being opened. The road was in the hands of a turnpike trust. On the revival of through road traffic consequent on the invention of motor cars the ferry again resumed the position that it occupied at the end of the eighteenth and early nineteenth centuries, and in 1913 more than 6000 cars were conveyed across it. From the time of the passing of the Act until the present day there had been large military and naval establishments of His Majesty in the neighbourhood of the ferry, whose requirements had necessitated the constant passage of the river within the limits of the ferry by officers of His Majesty's Ordnance and Army and Navy, and by vessels with goods for His Majesty's military and naval forces and otherwise for His Majesty's service.

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On behalf of the appellants it was contended :—

- (i.) That the ferry or the ferry tolls were not liable to be assessed to income tax by reason of the provision of the Act 30 Geo. 3, c. 61.
- (ii.) That the special exemption conferred by the Act was not repealed or lessened by the provisions of the general Income Tax Act, 1842, or any subsequent Income Tax or Finance Act or otherwise. Reference was made to the terms of s. 187 of the Income Tax Act, 1842.
- (iii.) That the special exemption conferred by the Act 30 Geo. 3, c. 61, in terms excluded liability to assessment to parliamentary taxes in respect of the ferry of which income tax was one; and that on the true construction of the Act and in the circumstances of the case the exemption included income tax. Reference was made to *Stewart v. Thames Conservators*. (1)

(1) [1908] 1 K. B. 893.

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- (iv.) That the fact that the income tax was imposed subsequently to 30 Geo. 3, c. 61, was in itself immaterial. Reference was made to *Associated Newspapers v. City of London Corporation*. (1)
- (v.) That 30 Geo. 3, c. 61, laid upon the proprietors a public duty enforceable by indictment and conferred on them a relief from other public burdens in return for their execution of the duty.
- (vi.) That no previous practice with regard to income tax on the ferry could affect the interpretation of the statute or the rights of the appellants, and that until the decision of the House of Lords last referred to the law had been imperfectly declared.

The Surveyor of Taxes contended (inter alia) :—

- (i.) That the ferry was assessable under s. 60, Sch. A., No. III., r. 3, of the Income Tax Act, 1842.
- (ii.) That 30 Geo. 3, c. 61, being a local and personal Act, could not confer exemption from income tax.
- (iii.) That the Act, having been passed before the Income Tax Act, could not affect the subsequent Revenue Act, which levied in express terms a new impost on profits arising from all ferries in this country.
- (iv.) That there was nothing in the wording of the exemption clause in the Act to imply that any but local rates and assessments were in question; while the context and purport of the Act lent no support to a wider interpretation, and the clause did not include income tax, which was an Imperial tax.
- (v.) That the absence of any land tax assessments on the ferry did not affect the general revenue, and was therefore of purely local importance.
- (vi.) That it would not be a reasonable interpretation of the exemption clause to allow that the whole of the kingdom should be called upon to bear the proprietors' income tax.

The Commissioners having considered the facts were of opinion that the appellants were not entitled to the exemption

claimed and dismissed the appeal, and confirmed the assessments subject to adjustment of figures as agreed. The appellants appealed.

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Rowlatt J. (applying to Imperial taxes the principle established by *Associated Newspapers v. City of London Corporation* (1), with regard to local taxes) held that the exemption granted by the Act of 1790 extended to parliamentary taxes whether in existence at the date of the passing of that Act or not, and therefore included the income tax, although that tax was first imposed subsequently to that date.

The Crown appealed.

Sir Ernest Pollock S.-G., T. H. Parr and R. P. Hills for the Crown. The exemption granted by the statute does not extend to relief from the payment of income tax. Imperial taxation stands upon a different footing from local taxation for the purposes of this question: *Associated Newspapers v. City of London Corporation*. (1) It is submitted that the exemption in this case is confined to local as distinguished from Imperial taxes. The Act of 1790 is, it is submitted, a local Act. It is true that s. 20 states that the Act is to be deemed a public Act, but that statement must be taken with some qualification. Although no exclusive user of the ferry is conferred by it on the inhabitants of Devon and Cornwall, the ferry was intended primarily for their benefit, and the words "public benefit" in the preamble must be construed as applying to them and not to the public at large.

The distinction between a general Act and a local and personal Act is thus stated by Bowen L.J. in *Reg. v. London County Council* (2): "A general Act, *prima facie*, is that which applies to the whole community. In the natural meaning of the term it means an Act of Parliament which is unlimited both in its area and, as regards the individual, in its effects; and as opposed to that you get statutes which may well be public because of the importance of the subjects with which they deal and their general interest to the community, but which are limited in respect of area—a limitation

(1) [1916] 2 A. C. 429.

(2) [1893] 2 Q. B. 454, 462.

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1920 or persons—a limitation which makes them personal.”

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Applying that test to the present case, it is submitted that the Act of 1790 is a local and personal Act. That being so the words of the exemption in s. 15 must have some limitation placed upon them. They do not, it is submitted, extend to exemption from Imperial taxation but must be confined to local taxation: *Williams v. Pritchard* (1); *Eddington v. Borman* (2); *Perchard v. Heywood* (3); *Rex v. London Gas Light & Coke Co.* (4)

In *Duke of Argyll v. Inland Revenue Commissioners* (5) the exemption was not limited to local taxes because the Act was not there dealing with local matters.

The words of exemption in the present case are from “any tax, rate or assessment whatsoever, parliamentary or parochial.”

A parliamentary tax is a tax imposed directly by Act of Parliament: *Palmer v. Earith* (6); *Bedford Union v. Bedford Commissioners* (7); and therefore includes income tax: *Stewart v. Thames Conservators.* (8)

When an Act of Parliament contains an exemption from all parliamentary rates and taxes that means, in the absence of special words, rates and taxes existing at the time when the Act was passed: *Sion College v. London Corporation* (9); *Stewart v. Thames Conservators.* (8)

The law on this point has not been altered by the decision of the House of Lords in *Associated Newspapers v. City of London Corporation* (10) where the question as to Imperial taxation did not arise for consideration. Their Lordships were careful in their judgments to confine their decision to local taxation and to leave open the question of Imperial taxation. [They also referred to *Brewster v. Kitchel.* (11)]

Sir John Simon K.C. and *A. M. Latter* for the respondents.

(1) (1790) 4 T. R. 2.

(6) (1845) 14 M. & W. 428, 431.

(2) (1790) 4 T. R. 4.

(7) (1852) 7 Ex. 777, 779.

(3) (1800) 8 T. R. 468.

(8) [1908] 1 K. B. 893.

(4) (1828) 8 B. & C. 54.

(9) [1901] 1 K. B. 617.

(5) (1913) 109 L. T. 893.

(10) [1916] 2 A. C. 429.

(11) (1698) 2 Salk. 615.

It is submitted that on the construction of the Act of 1790 the words of s. 15 are apt to cover the exemption from a tax in the nature of income tax. Ferries come under the Income Tax Act, 1842, s. 60, Sch. A., No. III., r. 3. Sect. 187 of the Act, which is a re-enactment of s. 229 of the Income Tax Act, 1803 (43 Geo. 3, c. 122), provides that no letters patent granted to any person of any tolls, taxes or assessments is to be construed or taken to exempt from income tax.

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As a mere matter of construction it is submitted that a parliamentary tax would cover income tax. That is involved in the decisions in *Stewart v. Thames Conservators* (1); *Bedford Union v. Bedford Commissioners* (2); and *Palmer v. Earith*. (3)

If that is a good point it would carry the respondents the whole way.

Before the decision of the House of Lords in *Associated Newspapers v. City of London Corporation* (4) it had been the impression of the profession that the effect of the decisions in *Williams v. Pritchard* (5), *Perchard v. Heywood* (6) and *Eddington v. Borman* (7) was that, unless it was expressly stated in the exemptions that they applied to future taxation, the exemptions applied only to existing imposts of the kind mentioned. The House of Lords did not overrule those decisions but merely pointed out that they had not been properly understood. They did, however, overrule the dictum of Bayley J. in *Rex v. Gas Light and Coke Co.* (8) in which, referring to the house and window tax, he observed that the tax "was a new one imposed after the exemption was given, and the exemption may be considered analogous to a covenant to pay taxes which applies to old taxes or others substituted for them, but not to taxes entirely new, unless there are express words to give it such extensive operation." See observations of Lord Wrenbury. (9)

When once the words "parliamentary taxes" are used in

(1) [1908] 1 K. B. 893.

(5) 4 T. R. 2.

(2) 7 Ex. 777.

(6) 8 T. R. 468.

(3) 14 M. & W. 428; 14 L. J. (Ex.)

(7) 4 T. R. 4.

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(8) 8 B. & C. 54, 62.

(4) [1916] 2 A. C. 429.

(9) [1916] 2 A. C. 429, 462, 463.

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an exemption clause there is no reason why those words should not have their natural meaning and extend to and include income tax, and the effect of the decision in *Associated Newspapers v. City of London Corporation* (1) is to show that they cover future taxation. It was contended, however, that that case had nothing to do with parliamentary taxes. That point is dealt with by Rowlatt J. in his judgment in the Court below. (2) [They also referred to Dowell's *Taxation in England*, vol. ii., pp. 129, 169.]

Sir Ernest Pollock S.-G., in reply, referred to *Lord Colchester v. Kewney*. (3)

LORD STERNDALÉ M.R. This is an appeal from the decision of Rowlatt J. in a case stated by the Commissioners for the General Purposes of the Income Tax Acts. The question that is raised is whether the appellants, Sir Reginald Pole-Carew and Lord St. Levan, who are the proprietors of a ferry called Torpoint Ferry, are or are not liable to income tax in respect of their earnings by that ferry.

The question arises under an Act of 1790. The ferry is a ferry across the River Tamar and connects the road coming to that river from the Devonshire side with the road that comes to it from the Cornish side, forming a link in the main road running east and west of that point. It was of very considerable importance in 1790 when the Act was passed, before there were any railways, because there was no bridge for many miles up the river. There was another ferry, I think, some miles up, but there was no way of getting across at this point except by something in the nature of this ferry. In consequence the Act in question was passed. [His Lordship referred to the recitals in the preamble and read the exemption in s. 15 of the Act and continued :]

Two questions have been raised upon that exemption : first, does it cover income tax, that is to say, does it cover anything more than local taxation ? Does it cover what is erroneously but often called Imperial taxation, or what is

(1) [1916] 2 A. C. 429, 438.

(2) [1919] 2 K. B. 393, 404.

(3) (1866) L. R. 1 Ex. 368 ; (1867) L. R. 2 Ex. 253.

perhaps more properly called national and general taxation, or is it limited to local taxation only? Secondly, assuming that it does cover national taxation—or perhaps I may still employ the erroneous word “Imperial” taxation, as it is used in several cases—does it cover only such taxation of that nature as was in existence at the time of the passing of the Act, or does it also cover future taxation? On the first point we have not the advantage of any expression of opinion by the learned judge. I do find, at any rate, a trace of the point in the report of Sir John Simon’s argument, but the learned judge gave no opinion upon it. It does not, however, matter, as the Crown are perfectly at liberty to raise the point here. The only reason which makes it of any importance is that we are deprived of the advantage of the opinion of the learned judge upon it. It is the fact as stated in the case, that, so far as can be traced, the profits of the ferry have always been assessed to income tax since it was first imposed in 1799. The tax was not at first continuous, but liability to it has never previously been disputed in principle by the owners of the ferry. That may be due to various causes; it may be that for some time the question of income tax was not a very important one. Before the introduction of railways the traffic we are told over this ferry was considerable, that after their introduction it still continued appreciable but decreased very much, and that it has only increased again of late years since the introduction of motor cars. Also, the income tax at the present time is very much higher than it was in any of those earlier years. It may have been that the matter was not considered of any very great importance, or it may be, as was suggested, that from the first time that there were any decisions upon the question of these exemptions it had been the opinion of the profession that such exemptions did not refer to future taxation. It was stated by Bray J. in *Stewart v. Thames Conservators* (1) that: “where an Act of Parliament contains an exemption from all parliamentary rates and taxes, that means, in the absence of any special words, rates and taxes existing at the time when the

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(1) [1908] 1 K. B. 893, 903.

C. A. Act in question was passed, and the exemption does not
 1920 extend to any rates or taxes subsequently imposed." That
 POLE-CAREW had been decided in *Sion College v. London Corporation* (1) a
 v. short time before the judgment of Bray J. was delivered. That
 CRADDOCK. statement of the law by Bray J. was quite an accurate state-
 Lord Sterndale ment of the law at the time that he made it. It has also
 M.R. been pointed out in the cases to which I shall have to refer
 upon another matter that it had been considered that a number
 of earlier cases before *Sion College v. London Corporation* (1)
 had laid down that same principle. Therefore it was generally
 taken as decided that an exemption, unless it expressly stated
 that it applied to future taxes, did not extend to them. That
 may well have been the reason why no question was raised.
 At any rate I do not think that matters : it cannot be taken
 as a contemporanea expositio or anything of that kind.
 Although it is not a matter to be overlooked it cannot affect
 the construction of the Act of Parliament.

To take the first point, does this exemption cover so-called
 Imperial taxation as well as local taxation? I think it is
 laid down quite clearly that, where there is an exemption
 from all rates, taxes and assessments, or all rates, taxes and
 assessments whatsoever or whatever, if there is any difference,
 that exemption has to be looked at in connection with the
 subject-matter of the Act in which it is contained, and also
 in connection with the context in which it occurs. It may
 be that when so looked at it may become necessary to limit
 the very wide terms in which the exemption is framed. An
 instance of that is to be found in the cases which have been
 decided upon the Act of Parliament which has been often
 under discussion, the Act of 7 Geo. 3, c. 37, which gave
 exemption to certain persons who reclaimed land from the
 river Thames for the purpose of the building of Blackfriars
 Bridge. The words of that exemption were "free from all
 taxes and assessments whatsoever." It has been quite
 clearly laid down with regard to that exemption that it applies
 only to local taxation and in a great measure upon this ground,
 that the Act was in the nature of what has been sometimes

called a bargain. It came into existence in these circumstances. The Corporation of London, who promoted the Bill, were anxious to get this land reclaimed, and they offered terms to the persons who would do it, in the Act of Parliament. Looking at those circumstances and also at the context in which the words occurred, it was held that the corporation could only have been offering an exemption from taxes which they had the power to impose, and that inasmuch as they had no power to impose what is called Imperial taxation or general taxation, the exemption could not refer to such taxation. That is an instance on the one side. To take an instance on the other side, in *Duke of Argyll v. Inland Revenue Commissioners* (1), where the exemption was from all taxes, it was held that that included all taxes of all descriptions, and from the subject-matter it is difficult to see how the decision could have been otherwise. We start therefore with this, that in construing the exemption you have to look to a certain extent to the subject-matter of the Act in which it is contained and to the context in which it occurs. But of course there is in this Act a very important difference in the language, and while you have to look at the circumstances and the context you must not omit to look also at the language. The language of the Act of 1790 is not "all rates, taxes and assessments" simply, but "any tax, rate or assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry," etc. It is therefore important to see what is the meaning of a parliamentary tax. That has been dealt with in two or three cases, the first of which is *Palmer v. Earith* (2) where the same expression is used, "all taxes, parochial and parliamentary, to be paid by the said tenant." Parke B. in giving judgment said: "A parliamentary tax is one that is imposed directly by Act of Parliament." I take that to mean in which the incidence comes direct from the Act of Parliament and not like the tax under the Poor Law, a tax which is imposed by the local authority and assessed by the local authority, though no doubt under statutory provisions. In *Bedford*

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(1) 109 L. T. 893.

(2) 14 M. & W. 428, 431.

C. A. *Union v. Bedford Commissioners* (1) Alderson B., who had
 1920 been a party also to the judgment in *Palmer v. Earith* (2),
 POLE-CAREW said: "The language of the 7 Geo. 3, c. 37, s. 51"—that is
 v. the Act in which the exemption was held to cover only local
 CRADDOCK, taxation—"is 'free from all taxes and assessment whatsoever.'
 Lord Sterndale The words of the 34 Geo. 3, c. xeviii., are 'free from all
 M.R. parochial and parliamentary taxes.' A parliamentary tax is a
 tax imposed directly by Act of Parliament, and for the benefit
 of the whole kingdom, which the rate in question is not.
 The meaning of a 'parliamentary tax' was considered in
Palmer v. Earith." (2) Platt B. said: "In that case the
 very distinction is pointed out which has been adverted to
 by my Brother Alderson." I do not know whether those
 statements would be called dicta or decisions. I do not think
 it matters; they are of very high authority indeed and they
 seem to have been acted upon, although I do not know that
 the matter was very much discussed by Bray J. in *Stewart v.*
Thames Conservators. (3) In that case the words were, "the
 properties therein mentioned shall be exempt from all parli-
 amentary rates, taxes and payments whatsoever," and
 the learned judge held that the exemption extended to income
 tax. He therefore followed the definition of parliamen-
 tary tax which had been given in the cases to which I have
 referred. It was suggested that the learned judge's decision
 depended to a certain extent upon the words which preceded
 the exemption: "notwithstanding anything in any Act."
 I cannot see how those words could operate to enlarge the
 meaning of the words "parliamentary rates, taxes and
 payments," and I find that they were not alluded to by him
 for any such purpose. They were alluded to by him with
 reference to an argument addressed to him that the Thames
 Conservancy Act, 1894, in which the exemption was contained,
 was only a consolidating Act which repeated the exemption
 contained in a much earlier Act of 1788, and it was in order
 to meet that argument that Bray J. said that that could not
 be right because the Act said "notwithstanding anything

(1) 7 Ex. 777, 779.

(2) 14 M. & W. 428, 431.

(3) [1908] 1 K. B. 893.

in any Act"; and that that must mean any Act before the passing of the Act of 1894. I do not think that those words in any way help the construction of the words in the exemption. That is the position in which the case stands, and it seems to me it is quite clear that the words "payment of any tax, rate or assessment whatsoever, parliamentary or parochial" mean what they say, that the exemption is not to be confined to parochial taxation or parochial rating but extends to general parliamentary taxation such as is defined in the cases to which I have referred, and such general parliamentary taxation includes the income tax. I think, therefore, that the judgment of Rowlatt J. was right on the first point although it is not expressly mentioned.

With regard to the second point I think it is decided for us by the House of Lords in *Associated Newspapers v. City of London Corporation*. (1) I do not mean that they decided the exact point, because the noble and learned Lords who composed the majority expressly stated that they were only dealing with local taxation; that is quite true, because the exemption in that case only included local taxation. But they did entirely do away with the meaning which had been attached to the earlier cases, namely, the meaning that unless altered by express words, an exemption from taxation related only to present and not to future taxation. They expressly overruled *Sion College v. London Corporation* (2), which had laid down that proposition and upon the authority of which Bray J. had quite correctly, as the law then stood, made the statement to which I have already referred. They went through the earlier cases which had been supposed to lay down the doctrine and pointed out that in their opinion those earlier cases did not lay down any such doctrine. The three cases which had always been referred to on this point are *Williams v. Pritchard* (3), *Perchard v. Heywood* (4) and *Eddington v. Borman*. (5) The majority of the noble and learned Lords, Lord Sumner dissenting, went through those cases with

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(1) [1916] 2 A. C. 429.

(3) 4 T. R. 2.

(2) [1901] 1 K. B. 617.

(4) 8 T. R. 468.

(5) 4 T. R. 4.

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considerable care and pointed out that they did not, in their opinion, bear the construction that had been put upon them, that although the case of *Sion College v. London Corporation* (1) did lay down the doctrine stated by Bray J., those earlier cases did not. The House of Lords held by a majority that under the Act of 7 Geo. 3, c. 37, to which I have referred, the exemption related to future local taxation and rating and not only to past.

Now it is argued that that case does not apply to so-called Imperial taxation, to a parliamentary tax, but I have been quite unable to ascertain any difference in principle on this point between the two. The only possible thing that I have heard that could be said in favour of it is that the majority of the House of Lords, in delivering their judgments, were very careful to point out that they were dealing only with local taxation, and therefore it must be taken that they thought that there was a distinction. I confess I do not quite understand why they were so very careful about it, but undoubtedly it is very much better that any tribunal in delivering a judgment should make it clear what are the limits of its decision. Judgments are sometimes quoted to support contentions which were not before the Courts which delivered those judgments, and it may very well be that, the House of Lords being the highest tribunal, the noble and learned Lords thought it right to make it quite clear that they were deciding nothing except the point that was before them.

But I do not think that they ever intended to suggest that there was any difference in principle between the one and the other kind of taxation; I think if they had they probably would have stated it. I cannot myself see any real difference in principle between the two, and I am fortified in my opinion that there is none by the fact that counsel for the Crown have not been able to suggest any. I think therefore that the appeal fails on both points.

We have also been referred to s. 213 of the Income Tax Act, 1918, which is in the same terms as s. 187 of the Income

Tax Act, 1842, which abolishes certain exemptions and does not abolish an exemption of this description. I do not myself think it is of very much importance; it perhaps points a little towards this exemption being what I have held it to be. But if it be considered to be an anomaly that the respondents should be free from income tax in respect of this ferry in the very different circumstances which now exist from those which existed when the exemption was granted, that is a matter for Parliament to consider. If Parliament chooses to deal with that exemption it can do so in the same way by s. 213 of the Act of 1918 as by s. 187 of the earlier Act of 1842 it dealt with other exemptions. Until it does so this exemption does, in my opinion, enure to the benefit of the respondents and to the extent claimed by them. I think therefore that the appeal should be dismissed with costs.

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WARRINGTON L.J. I am of the same opinion. The appeal is from an order of Rowlatt J., the effect of which is to affirm the exemption from income tax of the proprietors of the Torpoint Ferry. The ferry was constructed under a private Act of Parliament passed in the year 1790 and that Act contains a clause of exemption from taxation which I will read directly. [His Lordship referred to the recitals and read s. 15 of the Act and continued:]

Upon that section two questions arise. The first is whether income tax is a parliamentary tax according to the true construction of the section, and the second is whether, inasmuch as income tax was not in existence in the year 1790, the exemption extends to it. On the first point, in the absence of authority, I should have thought it quite clear that as between what one might call national, or as it has sometimes been called, Imperial, taxation and local taxation, the words of the Act make it plain that something beyond local taxation was to be included; otherwise it is difficult to understand why the framers of the Act should have inserted the word "parliamentary" as contrasted with the word "parochial." The natural meaning of the words, as it seems to me, would

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lead to the conclusion that it was intended to extend the exemption to such a tax as income tax which is imposed by Parliament upon the subject. But the matter is not entirely without authority and the authorities, such as they are, seem to me to be entirely in favour of the view which I have expressed and at which I should have arrived if there had been no authority.

In *Stewart v. Thames Conservators* (1), income tax was the tax as to which the question whether the Conservators of the Thames were entitled to exemption was raised. In that case the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), had exempted the river and towpaths and ferries and so forth, from London Bridge upwards, from all parochial charges, rates, taxes, assessments, impositions and payments, and had further exempted that part of the river from the City Stone above Staines Bridge upwards from all parliamentary rates, taxes, assessments and payments whatsoever. It was there held that the Conservators were under that Act of Parliament exempt from income tax. It is unnecessary for this purpose to deal with the particular question dealt with by Bray J., which was whether the income tax which had not been in existence at the date of the first Thames Conservancy Act, consolidated by the Act of 1894, could be included as a future tax. That is immaterial: the point is that income tax was there held to be within the words "parliamentary rates, taxes, assessment and payments."

In two earlier cases in the Court of Exchequer the meaning of the word "parliamentary" had been pointed out; first in *Palmer v. Earith* (2), where Parke B. says: "A parliamentary tax is one that is imposed directly by Act of Parliament." By that I think he means imposed directly on the subject by the Act of Parliament and not imposed through the medium of some local body, which makes the actual assessment bringing the tax into operation. The same definition practically is given by Alderson B. in the subsequent case, the *Bedford Case* (3),

(1) [1908] 1 K. B. 893.

(2) 14 M. & W. 428, 431.

(3) 7 Ex. 777.

with the addition of the words "and for the benefit of the whole kingdom."

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It seems to me therefore, having regard both to the natural meaning of the words and to the authorities on the point, that the income tax is within the expression "parliamentary tax" in this section of the Act of 1790.

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The second question is, inasmuch as income tax was not in existence when the Act of 1790 was passed, does the exemption extend to it? I agree that on that point this Court is concluded by the decision in the House of Lords in *Associated Newspapers, Ltd. v. City of London Corporation*. (1) That case arose upon an Act of 7 Geo. 3, c. 37, for the embanking of the river Thames, passed in 1767, by which land embanked from the river Thames was directed to be free from all taxes and assessments whatsoever. There had been an impression in the profession for many years, founded upon the supposed effect of three decisions in the Court of King's Bench, that that exemption did not extend to taxes not existing at the date of the Act or not substituted for taxes then existing, and in the *Sion College Case* (2) that had been actually decided. The majority of the House of Lords in the *Associated Newspapers Case* (1) came to the conclusion and clearly expressed their view that the three cases in the Court of King's Bench had not decided what they had been supposed to decide: that the decision in the *Sion College Case* (2) was incorrect; that there was nothing to prevent the Court from giving to the words used their natural construction; and that according to their natural construction they would include future taxes. It is quite true that the decision in the *Associated Newspapers Case* (1) related to local taxation only and that the Crown was not in any way a party to that litigation. The only parties were the appellants, the persons who it was said were liable to pay, and the Corporation of the City of London, the local body. It is also true that all the noble and learned Lords who expressed their view in that case said in terms that they were dealing only with local taxation, but now that the question is whether the same principle is to

(1) [1916] 2 A. C. 429.

(2) [1901] 1 K. B. 617.

C. A. apply to national taxes I confess that I can see no intelligible
1920 distinction between the two. Upon the other point I think
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dismissed.

SCRUTTON L.J. The question in this case is whether certain persons entitled in law to ferry rights over the Torpoint Ferry over the Tamar between Devon and Cornwall are, by the operation of the statute creating those rights, exempt from income tax. The language of s. 15 of the Act is that they "shall not be rated or assessed for or toward the payment of any tax, rate, or assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry, or the tolls, rates or duties payable in respect thereof, and the boats, vessels, or landing places thereto belonging." In the absence of authority two questions of construction might arise on that section: first of all, does it relate only to taxes, rates or assessments existing at the time when the Act was passed, or to subsequent modifications of existing taxes, or does it apply to all taxes, rates or assessments, whether existing at the time or coming into existence as new taxes in future?

In my view the Court is bound by the decision of the House of Lords in the *Associated Newspapers Case* (1) to decide that point in favour of the owners of the tolls. It is quite true in that case the subject-matter of the appeal was local taxes and not national taxes, but I can see no ground whatever for any distinction in construction which would in this case confine parochial taxes to existing or future taxes and parliamentary taxes to taxes existing at the time or substituted for them. In my view the decision of the House of Lords binds us to decide that point against the Crown.

The other point is this: supposing that the section extends both to existing taxes and to future taxes, is it confined to local taxes or rates as distinguished from national taxes or rates? The language "Any tax . . . whatsoever, parliamentary or parochial" seems to be as wide as it can be, and I have not

(1) [1916] 2 A. C. 429.

heard in the argument for the Crown any suggestion which has at all impressed me ; (I am not certain that I have heard any suggestion) ; as to why parliamentary taxes are to be cut down to parliamentary taxes limited to the particular locality. I can understand that in a case where one finds in a private local and personal Act dealing only with a particular locality, with recitals as to the local benefit, with a subject-matter which involves relations between a local corporation and a local landowner, a clause exempting from all taxes, rates or assessments, or all burdens, or any similar phrase, one may assume that inasmuch as the person is putting forward a grant to himself, the grant is limited to the subject-matter with which one may assume the parties to the Act—the persons engaged in the discussion of the Act—were concerned, and it may be limited to local rates. That may very likely be the true view of the Acts relating to the reclamation of the Thames which have been to the House of Lords on the subject of local taxes, as to which I believe there is no binding decision as to whether they cover taxes or not ; but when one looks at this Act one finds the most elaborate recitals showing that the ferry over the Tamar is considered of more than local importance. Anyone who has been as a judge of assize on the Western Circuit, and who has travelled on circuit in a motor car instead of trusting himself to the tender but somewhat long drawn out mercies of the railway, is aware that the main road from Bodmin homeward is over this ferry, and the Act recites that the ferry is not only a convenience to the inhabitants of both the adjoining parishes as well as to those of the other parts of the counties Devon and Cornwall, but will be of public benefit, meaning to the inhabitants of the kingdom as distinguished from those of the parishes and those of the two counties which it adjoins. Sect. 15 begins with the recital : “ The establishment and maintenance of the said intended ferry will be for the convenience and advantage of the public.” There seems to be therefore no ground in the subject-matter for cutting down the section to parliamentary taxes which have some special relation to the

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locality. One has the definition of a parliamentary tax by Park B. and Alderson B., that they mean taxes imposed directly by Parliament as distinguished from taxes which although they may have parliamentary authority behind them, are fixed in amount by the assessment of the local authorities. The use, then, of the word "parliamentary" points to the taxes being imposed directly by Parliament. The subject-matter is such that it is impossible to restrict taxes imposed directly by Parliament to taxes having some special reference to the locality. This point, also, which does not appear as far as I can see to have been brought pointedly to the attention of Rowlatt J. in the Court below, should, it appears to me, be decided against the Crown. If it is thought that exemption for 130 years, if they had chosen to avail themselves of it, from taxes is a sufficient recompense for the distinguished gentlemen who own this ferry, and that at the present time of national emergency they may well, with other citizens, contribute to the national burden; that is a matter for them and does not appear to be a matter for this Court. For these reasons I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitor for Crown : *Solicitor of Inland Revenue.*

Solicitors for respondents : *Walker, Martineau & Co.*

W. I. C.

SIMMONDS *v.* NEWPORT ABERCARN BLACK VEIN
STEAM COAL COMPANY, LIMITED.

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May 11, 12,
21.

[1920. S. 2587.]

*Mine—Coal Mine—Wages—Obligation to deliver detailed Pay Ticket—Colliery
Boy working with Butty—Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50),
s. 96, sub-ss. 2, 3.*

Sect. 96, sub-s. 2, of the Coal Mines Act, 1911, provides that "the wages of all persons employed in or about any mine shall be paid weekly, if a majority of such persons so desire, and there shall be delivered to each such person a statement containing detailed particulars of how the amount paid to him is arrived at."

Sub-s. 3: "Every person who contravenes or fails to comply with or permits any person to contravene or fail to comply with this section shall be guilty of an offence against this Act; and, in the event of any such contravention or non-compliance by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing the provisions of this section to prevent the contravention or non-compliance":—

Held, that the obligation imposed upon the mineowners by sub-s. 2 to deliver a detailed pay ticket to each person employed in or about a mine includes the duty to deliver a detailed pay ticket to a boy employed in the mine who works under, and whose wages are handed to him by, a butty who has received the amount from the mineowners.

Held, further, that this duty can be enforced not only by proceedings before justices under sub-s. 3, but by an action for a declaration at the instance of a boy so employed to whom a detailed pay ticket has been refused by the mineowners.

Action tried by Bray J. without a jury.

The plaintiff claimed a declaration that he being a person employed by the defendants in or about their mine and entitled to be paid wages weekly was, by virtue of s. 96, sub-s. 2, of the Coal Mines Act, 1911, entitled to have delivered to him weekly by the defendants while he was employed by them a statement containing detailed particulars of how the amount paid to him weekly as wages was arrived at, and that the defendants were under a statutory duty to deliver that statement to him.

The defendants refused to deliver any statement to the

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plaintiff, insisting that in the circumstances he was not entitled to receive one.

The following statement of facts is taken from the judgment: "The plaintiff was seventeen, and he had worked in the colliery ever since he was fourteen. He had then gone to the manager's office at the defendants' colliery with a man named David Beech, who was to be his buttty. He told the manager that he wanted to start with Beech. The manager told him he might start the next day, and he was required to sign a book called the contract book, and this he did. I refer to this book later. Nothing was said about wages, but the plaintiff knew that the wages would be the minimum wages then prevailing. These wages were so much a day (in accordance with Lord St. Aldwyn's award) according to the age of the boy, with three additions, one called the percentage, depending on the price of coal, another called the war wage, and a third, a sum of 2s., under Sankey J.'s award. The wages were to be subject to certain deductions for doctor, health insurance, etc. The buttty was not entitled to pay more than 9d. extra plus the percentage under clause 7(3.) of Lord St. Aldwyn's award. I gather that there was no agreement between the plaintiff and Daniel Harris, his buttty at the time this action was commenced, to pay him anything more than the minimum wage with, of course, the three additions. Buttties did not always insist upon the deductions and occasionally made the boy presents, as an encouragement to work, but these were not paid as wages. After a time Beech fell ill and ceased working, and the plaintiff was then sent to work with David Lewis by the official who had charge of that district in the mine. After some months, Lewis was called up for the army and the plaintiff was then sent by the official to work with Daniel Harris. During this time, he was occasionally taken away for short times, with Harris' consent, to work for the defendants elsewhere on other work, such as light carrying, etc., and sometimes he was sent to work under other buttties.

"During the whole of the time, the plaintiff was paid his wages by the buttty under whom he worked, and this was so

even when he had worked for the colliery. He knew what he was entitled to, and his wages rose as he got older. It did not appear that he ever received more than the wages due under the award except that occasionally, as I have stated, he got presents from his butty. All this was according to the usual practice at the colliery. The butty had no right to dismiss him. He could complain to the manager, and the manager in such a case would find the boy work with another butty, or could give him fourteen days' notice to leave the colliery. The butty received a weekly statement from the defendants showing the wages due to him, but not showing the wages due to the plaintiff except when the plaintiff had been working for the defendants, or when the butty was on day work. The butty paid the plaintiff out of the money he received from the defendants. Several weekly statements were produced which show the course of business as between the butty and the defendants. The defendants keep a book called a time book in which appear the names of the workmen employed, and this included the names of the butties and the boys who worked under them. This book was put in evidence. It shows the name of Daniel Harris and of the plaintiff and the number of days the plaintiff worked and his wages. It contains all the materials for determining what the plaintiff was entitled to every week. This book is kept by the fireman who obtains from the butty the rate of wages paid to the boy by the butty every month. No record is kept of any presents made to the boy by the butty, but if the butty paid him the extra 9d., that, I gather, would be entered. The contract book signed by the plaintiff is a copy of the Conciliation Board Agreement. It purports to be a contract between the plaintiff and the defendants and it is signed by the defendants as well as by the plaintiff. The under-manager is the only man who can sign a boy on. The Conciliation Board Agreement, by clause 32 directs that every person employed must sign this book.

"The defendants called the manager, and some of the facts I have stated were taken from his evidence. Substantially there was no dispute. He stated, I think, in answer to a

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question of mine : ' My position is that if a boy is a collier's boy (as the plaintiff was) he is not entitled to a ticket at all from me or the butty. That is my defence to this action.' ' Ticket ' means the weekly statement which is delivered to the butty every week. It shows the detailed particulars of how the amount due to the butty is made up and it complies with the sub-section."

Disturnal K.C. and *Lincoln Reed* for the plaintiff. On the clear language of s. 96, sub-s. 2, of the Coal Mines Act, 1911, the plaintiff is entitled to have delivered to him by the defendants a statement containing detailed particulars of how the amount paid to him each week is arrived at. At present when his wages are included in the pay ticket of the butty under whom he works it is impossible for him to know definitely what he is entitled to, and it is essential that he should know in case he should have at any time to make a claim for compensation under the Workmen's Compensation Act, 1906.

Compston K.C. and *Harold Morris* for the defendants. This Court has no jurisdiction to entertain the action, inasmuch as by s. 96, sub-s. 3, of the Act, failure to comply with the requirements of s. 96 is made an offence and is cognizable only by justices. Assuming, however, that there is jurisdiction to entertain the action, the declaration asked for, being discretionary, ought not to be made in view of the remedy open to the plaintiff under sub-s. 3 : *Grand Junction Waterworks Co. v. Hampton Urban Council*. (1) Further, regard must now be had to the provisions of the Coal Mines (Minimum Wage) Act, 1912, which necessarily alters the construction of the Act of 1911 by virtue of its provisions as to the payment of wages. But, even apart from the Act of 1912, the defendants' contention must prevail, because the words of s. 96, sub-s. 2, "detailed particulars of how the amount paid to him is arrived at" apply only in the case of piece workers and not to day workers, as boys are. It would be absurd to require detailed particulars in the case of a person

(1) [1898] 2 Ch. 331.

who is paid at so much per day. Sect. 94, sub-s. 2, clearly recognizes employment in or about a mine which is not in the strict sense employment by the colliery owner, for that sub-section speaks of "the immediate employer of every boy, other than the owner, agent or manager of the mine," thus pointing to the butty as the boy's employer, who actually pays the plaintiff, and is therefore the person, if any, to deliver a detailed pay ticket to the plaintiff. The plaintiff seeks to add words to s. 96, sub-s. 2.

[BRAY J. If your argument is correct, why were boys not specially excepted in s. 96, sub-s. 2 ?]

The Legislature may have forgotten for the moment the peculiar relationship of butty and boy.

[BRAY J. Why should the owner, agent or manager of the mine be made liable by s. 96, sub-s. 3, to a penalty for omitting to deliver a pay ticket to a boy if the obligation to deliver the ticket is on the butty ?]

The duty of those persons is only to deliver a pay ticket to a piece worker.

Disturnal K.C. in reply. First, with regard to the jurisdiction of the Court to entertain this action : s. 96, sub-s. 2, clearly imposes the duty of delivering a detailed pay ticket upon someone, and in considering whether in a civil action that duty can be enforced reference must be made to the statute to see whether proceeding criminally under sub-s. 3 is the only remedy. Upon that question *Groves v. Lord Wimborne* (1) is a clear authority in the plaintiff's favour. As A. L. Smith L.J. there pointed out (2) the fine under the penalty section is inflicted by way of punishment for the neglect of the statutory duty and must be proportionate to the character of the offence ; that consideration and the fact that the fine does not necessarily go to the person affected by the breach of the duty showed, as the Lord Justice said, that it could not have been the intention of the Legislature that the imposition of a fine by way of punishment for neglect of the duty should take away the prima facie right of the workman to pursue his civil remedy : see to the same effect per

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(1) [1898] 2 Q. B. 402.

(2) *Ibid.* 407-9.

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Fletcher Moulton L.J. in *David v Britannic Merthyr Coal Co.* (1), and *Watkins v. Naval Colliery Co.* (2) Secondly, there having been a breach of the statutory duty the Court can make a declaration as to the plaintiff's rights. No doubt in a sense the relief is discretionary, but the discretion must be exercised judicially, and this is a proper case for the relief being given in view of the defendants' refusal to give the plaintiff a pay ticket. Without a pay ticket the plaintiff has no means of checking the accuracy of the amount of wages he receives. He is entitled to be protected not only against fraud but against honest mistake. Thirdly, the obligation to deliver the pay ticket rests upon the defendants and not upon the butty. The person who physically hands over the money is not the paymaster; the paymaster is the person who owes the money—in this case the defendants. A contract of service exists between the defendants and the plaintiff, and the defendants are responsible for the payment of the plaintiff: *Churm v. Dalton Main Collieries* (3) and *Hooley v. Butterley Co.* (4). *Higginson v. Blackwell Colliery Co.* (5) may seem against the view now contended for. But it is to be observed that that case was decided before the Conciliation Board Agreement, and, further, that it came before the Court on certain findings of fact by the county court judge which could not be reviewed.

Cur. adv. vult.

May 21. BRAY J. read the following judgment. The plaintiff was a collier's boy, that is, he worked in the defendants' colliery under a man employed by the colliery to cut coal, commonly called a butty. He was paid his wages weekly by the butty. He received no statement showing how the amount paid him was made up either from the defendants or from his butty, and he claimed a declaration that he was entitled to have delivered to him by the defendants a statement containing detailed particulars of how the amount

(1) [1909] 2 K. B. 146, 157.

(3) [1916] 1 A. C. 612.

(2) [1912] A. C. 693.

(4) [1916] 2 A. C. 63.

(5) (1914) 112 L. T. 442.

paid to him was arrived at. His claim was based on s. 96, sub-s. 2, of the Coal Mines Act, 1911. The defendants had refused to deliver any such statement to him and insisted that under the circumstances he was not so entitled.

Several points were raised by the defendants' counsel in the trial before me. They said, first, that he was not a person entitled to such a statement as he was a day worker, and the section did not apply to day workers. Secondly, that if the section did apply, it was repealed by the Coal Mines (Minimum Wage) Act, 1912. Thirdly, that if it did apply, it was not the defendants whose duty it was to deliver the statement: it was the duty of the butty as the paymaster. Fourthly, that if he was entitled, the only remedy the plaintiff had was to prosecute under sub-s. 3, and that I had no jurisdiction to make a declaration. Fifthly and lastly, that if an action would lie against the defendants for a declaration, it was a matter for my discretion and I ought not to exercise it in the plaintiff's favour.

In order to decide these points, it is necessary to see what the real position of the plaintiff was. A good deal of evidence was given as to this, but the facts were hardly in dispute. [His Lordship stated the facts set out above and continued:] I will now deal with the points made by the defendants' counsel. There was no doubt that the plaintiff was employed in or about the mine, but it was contended that these words in s. 96, sub-s. 2, did not include either men or boys employed on day wages, because everybody knew what the day wage was; it was not based on the amount of coal worked. That is true as a rule, and the plaintiff here did know what he was entitled to. He was a clever boy, but I can imagine cases of stupid boys who might be taken in by a dishonest butty. The amount due was not a single item: it was made up, as I have stated, of the day wage with three additions, and there were, on the other side, deductions to be made. When the Act was passed, there was no minimum wage, and Mr. Compston argued that when that Act was passed and the minimum wage was fixed, there was no need for a statement in the case of a day worker, and that the section was impliedly repealed.

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I cannot accept these contentions. The words of the sub-section are perfectly plain: "The wages of all persons employed in or about any mine." The plaintiff was certainly such a person, and whether he can be said to have been employed by the butty or not, he certainly was employed in the mine, and he signed a contract of employment between himself and the defendants. I have nothing to do with the question whether it was really necessary for the plaintiff to have a ticket. The Act says he shall have one.

The next point was that it was not the defendants' duty to deliver the statement; it was the duty of the butty. The sub-section is silent as to the person who has to perform the duty, but the plaintiff contends that impliedly the duty falls on the owner. This is the case in several sections of the Act, such as ss. 44, 46, 47, 48, 49 and others. In these cases the duty clearly is upon the owner; so it is in this sub-section as regards every collier who cuts coal—a statement has to be delivered to him. Sub-s. 3 supports the plaintiff's contention, because the owner can be prosecuted. It is hardly likely that the person on whom the duty should fall should be the butty, and he alone. He might be entirely uneducated and possibly unable to write, and quite unable to prepare detailed particulars. But assuming that the duty is to fall upon the person who has to pay the boy, is not the owner liable to pay? Two cases in the House of Lords were cited as showing that the owner—i.e., in this case, the defendants—is liable to pay a man or boy in the position of the plaintiff: *Churm v. Dalton Main Collieries* (1) and *Hooley v. Butterley Co.* (2) The terms of the contract signed were not quite the same as those signed by the plaintiff, but I think the principles there laid down apply to this case. *Richards v. Wrexham and Acton Collieries* (3) was overruled. I desire to express no opinion on the question whether, if the colliery paid the collier the wages due to the boy and the collier failed to pay the boy, the colliery company would be discharged by reason of such payment. That is not the question here. It was suggested by Mr. Compston

(1) [1916] 1 A. C. 612.

(2) [1916] 2 A. C. 63.

(3) [1914] 2 K. B. 497.

that the case of the collier's boy had been overlooked by the Legislature. It was a *casus omissus*. The Legislature had made no provision for the collier's boy. I look at s. 94, sub-s. 2: "The immediate employer of every boy": that, I think, clearly refers to the *butty*. It is impossible to suppose that the case of the collier's boy had been forgotten. It has been the custom for boys to be employed in this way for fifty years at least. In my opinion it was the duty of the owners to have a statement prepared in accordance with the sub-section, and to have it delivered to the plaintiff.

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I come to the next point, that the only remedy is to prosecute, and therefore that I have no jurisdiction to make this declaration. I think the cases of *Groves v. Lord Wimborne* (1); *David v. Britannic Merthyr Coal Co.* (2); *Watkins v. Naval Colliery Co.* (3); show that there is a civil remedy as well. I think it is clear that the provisions of s. 96, sub-s. 2, were made for the protection of persons employed in and about a mine. I have already held that the plaintiff was such a person, and I think sub-s. 2 does give him a civil remedy. It becomes therefore a matter of discretion: see *Grand Junction Waterworks Co. v. Hampton Urban Council* (4); and I have to consider all the circumstances. Now, a definite issue was raised by the defendants before action and in their defence and before me. There has been no prosecution and the action has come to trial. Surely it is convenient that I should decide the point; the case can be taken up to the House of Lords if desired. Why should I tell the plaintiff that he must prosecute the defendants? In my discretion, I think it is a case where I ought to make a declaration if I am in the plaintiff's favour. The circumstances of the case cited above were different, and I think that that case is clearly distinguishable. The defendants, the council, were obviously threatening criminal proceedings, and the real object of the action was to stop such proceedings.

I think it was the duty of the defendants to deliver to the plaintiff the statement required by s. 96, sub-s. 2,

(1) [1898] 2 Q. B. 402.
(2) [1909] 2 K. B. 146.

(3) [1912] A. C. 693.
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of the Coal Mines Act, 1911, and that I ought to make the declaration.

[On the application of the defendants, Bray J. said that he would add the words "their servants or agents" to the declaration, which would therefore be that the plaintiff was entitled to have delivered to him weekly by the defendants, their servants or agents, a statement containing detailed particulars of how the amount paid to him weekly as wages was arrived at.]

Judgment for plaintiff.

Solicitors for plaintiff: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for defendants: *Bell, Brodrick & Gray, for Kensholes & Prosser, Aberdare.*

J. S. H.

1920
May 17.

SCHAFFER v. BLYTH.

[1920. S. 503.]

Practice—Judgment by Default—Setting aside—Application—Time—Enlargement—Rules of the Supreme Court, Order xxxvi., r. 33; Order lxiv., r. 7.

Order xxxvi., r. 33, provides that: "Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or a judge . . . upon an application made within six days after the trial":—

Held, that the Court has a discretion to enlarge the time appointed by that rule, so as to enable the application to be made as soon as practicable after the expiration of the time to the judge who tried the action.

Bradshaw v. Warlow (1886) 32 Ch. D. 403 followed.

Walker v. James (1885) 53 L. T. 597; 34 W. R. 29 not followed.

APPLICATION to set aside judgment.

The plaintiff, a moneylender, brought the present action against the defendant, a country solicitor, by a writ of summons specially indorsed under Order III., r. 6, with a

statement of his claim for a liquidated sum alleged to be due on a promissory note for money lent and interest.

On May 3, 1920, the action was tried before Lush J., and in default of appearance by the defendant, either in person or by counsel, judgment was given for the plaintiff for the amount claimed.

On May 17, 1920, the defendant made the present application to Lush J., to set aside the judgment and restore the action to the list.

The defendant stated that he had searched the cause lists for the action, but had been led to suppose that it would not be tried on May 3. He further stated that he had intended to make an application to the Court under Order xxxvi., r. 33 (1), within six days after the trial, to set aside the judgment and restore the action to the list; that he had served notice of the application upon the plaintiff's solicitors within that period; but that he understood that the application must be made to the judge who had tried the action, and as he found on the sixth day after the trial that Lush J. was not sitting on that day, he did not make the application within the six days.

Harold Simmons for the plaintiff. There is a preliminary objection to the hearing of this appeal. Where judgment has been obtained in default of appearance, an application to set it aside can only be made under Order xxxvi., r. 33 (1), which provides that it be made within six days after the trial. It is imperative that the application be made within the time specified in the rule: *Walker v. James*. (2) This

(1) Rules of the Supreme Court, Order xxxvi., r. 33: "Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or a judge upon such terms as may seem fit, upon an application made within six days after the trial. . . ."

Order lxiv., r. 7. "A Court or a judge shall have power to enlarge or abridge the time appointed by

these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

(2) 53 L. T. 597; s. c. nom. *Walter v. James*, 34 W. R. 29.

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application was not made within the time limited, and the Court has therefore no jurisdiction to entertain it.

The defendant in person. The preliminary objections should be overruled. It is not imperative that the application be made within the time appointed by the rule. The Rules give the Court power to enlarge the time in any case. The Court ought here to enlarge the time for making the application. The defendant served notice of the application upon the plaintiff's solicitors within the six days, and he only failed to make the application within that time because the judge who tried the action was not sitting on the sixth day.

In the circumstances the Court should allow the application and set aside the judgment. The defendant looked at the cause lists but was misled as to the day of trial, and thus made default in appearance.

LUSH J. This action was tried before me on May 3 last, when on the non-appearance of the defendant, who is a country solicitor, I gave judgment against him with costs. This is an application on behalf of the defendant to set aside the judgment and restore the action to the list. Counsel for the plaintiff has taken the preliminary objection that the application is not made within six days after the trial as required by Order XXXVI., r. 33 (1), and that I have no power to enlarge the time for making it. In support of the objection he relies on *Walker v. James*. (2) In that case, where the circumstances were similar to those of the present case, North J. did no doubt hold that it was imperative that the application should be made within the time appointed by the rule, and that the Court had no power to enlarge the time, and if that decision is binding upon me I should have to dismiss the application. Unless it is binding upon me, I should, however, be slow to follow it, because personally I do not take the same view as was taken by North J. It cannot, I think, have been intended that the

(1) See note ante, p. 141.

(2) 53 L. T. 597; 34 W. R. 29.

period of six days appointed by the rule should in every case be treated as a fixed period incapable of extension, inasmuch as a litigant might be absolutely prevented by illness or an accident, or other circumstances, from making an application within the six days, and in that case a grave injustice might be worked if he was debarred from making the application at a later date. On consideration I think that the decision of North J. is not binding upon me. The same point in substance came before the Court of Appeal in *Bradshaw v. Warlow*.⁽¹⁾ It is true that it was Order XXXIII., r. 21, of the Rules of the Palatine Court of Lancaster which was there under consideration, but the language of that rule is substantially identical with that of the rule now in question. In that case *Walker v. James* ⁽²⁾ was cited, but the Court of Appeal took the view that the Court had power to enlarge the time so as to admit of the application being made to the Court on the first practicable day after the expiration of the six days. That decision of the Court of Appeal seems to me to be in conflict with *Walker v. James* ⁽²⁾, and therefore impliedly to disapprove it.

That being so, I think that the latter case does not prevent me from exercising here the power to enlarge the time which is conferred upon the Court by Order LXIV., r. 7. Nor can I see any other reason why that rule is not applicable to this case. Counsel for the plaintiff has contended that it ought not to be applied, because the plaintiff should not be deprived of the fruits of the judgment which has been given in his favour, unless the defendant's application to set aside the judgment has been made strictly in accordance with the rules. I cannot agree with that. The object of the rule was to give the Court in every case a discretion to extend the time with a view to the avoidance of injustice. It is true that the defendant did not make the application within six days after the trial. He had however served notice thereof upon the plaintiff's solicitors within the six days. Moreover, I think that these applications ought to be made

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(2) 53 L. T. 597; 34 W. R. 29.

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to the judge who tried the case, and it so happened that I was not sitting on the sixth day after the trial.

In the circumstances I think that the application of the defendant should be granted. He has explained that he searched the cause lists for the action and was misled as to the day of trial. He made an excusable mistake, and he ought not to suffer unnecessarily for it. I order that the action be restored to the list, and I will try it myself. (1) The defendant however must pay the costs thrown away.

Application granted.

Solicitors for the plaintiff: *Woolfe & Woolfe.*

J. R.

C. A.

[IN THE COURT OF APPEAL.]

1920

BRADSHAW AND ANOTHER v. BIRD.

May 12, 13.

Landlord and Tenant—Agricultural Holding—Compensation—Sale Holding—Tenant's Expense of Quitting—"Landlord"—Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), ss. 11, 48—Agricultural Holdings Act, 1914 (4 & 5 Geo. 5, c. 7), s. 1.

By s. 11 of the Agricultural Holdings Act, 1908, where in certain circumstances "the landlord of a holding" terminates the tenancy by notice to quit, the tenant upon quitting the holding is entitled to compensation for the loss or expense incurred by him in connection with the sale or removal of his household goods, or his implements of husbandry, produce, or farm stock, on or used in connection with the holding; but no compensation under this section shall be payable (a) unless the tenant has given "the landlord" a reasonable opportunity of making a valuation of the goods, implements, produce, and stock as aforesaid; (b) unless the tenant has within two months after he has received notice to quit given to "the landlord" notice in writing of his intention to claim compensation.

By s. 48 of the Act "landlord" means any person for the time being entitled to receive the rents and profits of any land.

(1) The second trial of the action took place before Lush J. on June 2, 1920. See 36 Times L. R. 689.

By s. 1, sub-s. 1, of the Agricultural Holdings Act, 1914, where the tenancy of a holding is terminated by notice to quit in view of the sale of the holding the tenant shall be entitled to recover compensation in terms of and subject to the provisions of s. 11 of the Act of 1908, except as to the time for giving notice of intention to claim.

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Certain landowners let a farm to tenants. In 1917 they gave notice to the tenants to quit at Michaelmas, 1918, with a view to the sale of the farm. In October, 1917, they agreed to sell the farm to a purchaser. On July 5, 1918, the tenants gave to the purchaser, who was then entitled to the rents and profits, notice in writing under s. 1, sub-s. 1, of the Act of 1914 of their intention to claim compensation in terms of s. 11 of the Act of 1908. On July 18, 1918, the sale of the farm was completed :—

Held, that the purchaser was the "landlord" within the meaning of the Acts; that the notice of intention to claim compensation was rightly given to him; and that he was liable to pay compensation.

APPEAL from the decision of the County Court of Bedfordshire holden at Leighton Buzzard upon a special case stated by an arbitrator under the Agricultural Holdings Acts, 1908 and 1914, from which the following facts appeared :—

The holding known as the Tythe Farm, Bedfordshire, was by agreement in writing dated September 30, 1908, let on a yearly tenancy by P. P. Gilpin and his trustees to C. T. Bradshaw and N. A. Bradshaw.

Alfred Bird, a farmer, purchased the reversion on the holding in July, 1918, and it was conveyed to him by an indenture dated July 18, 1918, by P. P. Gilpin and his trustees. (1)

In view of the sale of the holding P. P. Gilpin and his trustees at some date in the year 1917 served on C. T. Bradshaw and N. A. Bradshaw a notice to quit the holding on September 29, 1918.

Alfred Bird did not in any way concur in giving notice to quit. It was given before he purchased the holding and without his knowledge, but he purchased with the knowledge that the notice had been given.

A claim for compensation for disturbance was duly made on

(1) The following additional facts, though not stated in the special case, were found by the county court judge :—The contract of sale was dated October 16, 1917; the date named for completion was Decem-

ber 25, 1917, from which date the purchaser was to be entitled to the rents and profits; if the completion was delayed the purchaser was to pay 5 per cent. on the purchase-money.

C. A. December 10, 1918, by C. T. Bradshaw and N. A. Bradshaw,
 1920 the notice of claim being addressed to and served upon Alfred
 Bird by registered letter dated July 5, 1918.

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C. T. Bradshaw and N. A. Bradshaw quitted the holding at Michaelmas, 1918, their tenancy being determined by the notice to quit.

Alfred Bird contended that he was not liable to pay compensation for disturbance to C. T. Bradshaw and N. A. Bradshaw under the provisions of the Agricultural Holdings Acts, 1908 and 1914. (1)

(1) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 1.—(1.) "Where a tenant of a holding has made thereon any improvement comprised in the First Schedule to this Act he shall, subject as in this Act mentioned, be entitled, at the determination of a tenancy, on quitting his holding to obtain from the landlord as compensation under this Act for the improvement such sum as fairly represents the value of the improvement to an incoming tenant."

s. 11: "Where (a) the landlord of a holding, without good and sufficient cause, and for reasons inconsistent with good estate management, terminates the tenancy by notice to quit, or, having been requested in writing, at least one year before the expiration of a tenancy, to grant a renewal thereof, refuses to do so: or (b) it has been proved that an increase of rent is demanded from the tenant of a holding, and that such increase was demanded by reason of an increase in the value of the holding due to improvements which have been executed by or at the cost of the tenant, and for which he has not, either directly or indirectly, received an equivalent from the landlord, and such demand results in the tenant quitting the holding, the tenant upon quitting the holding shall, in addition to the

compensation (if any) to which he may be entitled in respect of improvements . . . be entitled to compensation for the loss or expense directly attributable to his quitting the holding which the tenant may unavoidably incur upon or in connexion with the sale or removal of his household goods, or his implements of husbandry, produce, or farm stock, on or used in connexion with the holding: Provided that no compensation under this section shall be payable (a) unless the tenant has given to the landlord a reasonable opportunity of making a valuation of such goods, implements, produce, and stock as aforesaid; (b) unless the tenant has within two months after he has received notice to quit or a refusal to grant a renewal of the tenancy, as the case may be, given to the landlord notice in writing of his intention to claim compensation under this section; . . ."

Sect. 48.—(1.) "In this Act, unless the context otherwise requires, . . . 'landlord' means any person for the time being entitled to receive the rents and profits of any land."

Agricultural Holdings Act, 1914 (4 & 5 Geo. 5, c. 7), s. 1.—"(1.) Notwithstanding any agreement to the contrary, where the tenancy of a holding is terminated after the passing of this Act by notice to quit given after that date—(a) in view of

C. T. Bradshaw and N. A. Bradshaw contended that Alfred Bird was liable to pay them compensation for disturbance under the provisions of those Acts.

The question for the Court was whether Alfred Bird was liable to pay compensation for disturbance to C. T. Bradshaw and N. A. Bradshaw under the provisions of the said Acts.

The county court judge held that Alfred Bird was liable to pay compensation.

Alfred Bird appealed.

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Hon. R. Stafford Cripps (*W. Allen* with him) for the appellant. The question raised by this case is who is the landlord? Is he the person entitled to receive the rents and profits of the land at the date of the notice to quit, or the person entitled to receive them at the date of giving notice of intention to claim, or the person entitled to receive them on the determination of the tenancy, or the person entitled at the time of paying compensation? It is not likely that the Legislature intended to include all and singular in the expression "landlord." To avoid confusion the word should be construed to indicate one of the four and to exclude the rest; otherwise one person may have to pay compensation for unreasonable disturbance of the tenant by another, and the assignee of the reversion may have to pay for the bad estate management of his assignor. Sect. 11 of the Act of 1908 clearly points to one person as the landlord—namely, the person who terminates the tenancy by notice to quit. He is the proper person to pay compensation. He being the person entitled to the rents and profits of the land at the time when

the sale or offering for sale of the holding or any part thereof; or (b) by or at the request of the purchaser of the holding before the expiration of one calendar year after completion of the purchase of the holding for any reason other than the wrongful act or default of the tenant in relation to the holding; the tenant shall be entitled to recover com-

pensation in terms of, and subject to the provisions of, s. 11 of the Agricultural Holdings Act, 1908, except that the notice by the tenant of his intention to claim compensation required by that section may be given at any time not less than two months before the determination of the tenancy."

C. A. the right to claim compensation arises is the proper person
1920 to pay compensation. When the notice to quit was given
BRADSHAW in this case Gilpin and his trustees were the landlords, and
v. they are the persons to whom notice of intention to claim
BIRD. should have been given and who are the persons liable to pay
 compensation.

Foà for the respondents was not called on.

BANKES L.J. This appeal must be dismissed. The words of the statute are clear. The respondents were tenants of a farm which had been let to them by P. P. Gilpin and his trustees on a yearly tenancy terminable at Michaelmas. In 1917 the landlords served on the respondents a notice to quit at Michaelmas, 1918. It appears that in October, 1917, the appellant agreed to buy the farm from the owners, and from the date of that agreement he became the person entitled to the rents and profits of that land. On July 5, 1918, the respondents served notice on the appellant that they claimed compensation. On July 18, 1918, a conveyance to the appellant was executed by the former owners, and the purchase of the property was completed. In these circumstances the appellant says that he was not the person upon whom the notice claiming compensation ought to have been served, and that he is not bound to pay compensation.

The question turns upon the meaning of the Agricultural Holdings Acts. There are three sections to be considered : First, s. 1 of the Act of 1908 provides that, where a tenant has made any improvement of the class mentioned in the Act, he shall be entitled at the determination of the tenancy on quitting the holding to obtain from the landlord as compensation a sum representing the value of the improvement. Then s. 11 provides that where in certain circumstances the landlord of a holding terminates the tenancy by notice to quit the tenant upon quitting the holding shall, in addition to compensation for improvements, be entitled to compensation for loss or expense directly attributable to his quitting the holding. The principal enactment of this section does not say by whom this compensation is payable ; but it is plain from s. 1 and

from the proviso to s. 11 that the person to pay compensation is "the landlord." Then s. 48 defines "landlord" as "any person for the time being entitled to receive the rents and profits of any land." The proviso to s. 11 enacts that no compensation is payable under that section unless the tenant has given the landlord a reasonable opportunity of making a valuation of the goods, implements, produce, and stock mentioned in that section. If there is substituted for "landlord" the definition given in s. 48, the proviso reads, "unless the tenant has given to the person for the time being entitled to receive the rents and profits of the land a reasonable opportunity of making a valuation," etc. That must mean the person entitled to receive the rents and profits at the time when the opportunity occurs, and not the person entitled at the date of the notice to quit. The second clause (*b*) of the proviso is clearer still; no compensation is payable unless the tenant has, within two months after receiving notice to quit or refusal of a renewal, given the landlord—i.e., the person for the time being entitled to the rents and profits—notice in writing of his intention to claim compensation. That clearly indicates as the person to whom notice of intention to claim is to be given the person entitled to the rents and profits at the time when the tenant gives the notice.

Now look at the Act of 1914, which provides for compensation in other circumstances—namely, where notice to quit has been given in view of the sale of the holding. Where that takes place, "the tenant shall be entitled to recover compensation in terms of, and subject to the provisions of s. 11 of the Agricultural Holdings Act, 1908"—with a certain exception as to the time when the notice of intention to claim is to be given. In other words, the tenant is entitled to recover compensation from the landlord, that is the person entitled for the time being to the rents and profits of the land. It is true that this may cause difficulties to persons who do not know their true position, but that is no reason for interpreting a statute otherwise than in accordance with its plain meaning. The question submitted to the Court must be answered in favour of the respondents.

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BANKES L.J.

C. A. SCRUTTON L.J. I am of the same opinion. The respondents
1920 were tenants whose holding was terminated by notice to quit
BRADSHAW in view of the sale of the holding. By s. 1 of the Act of 1914
v. BIRD. a tenant in these circumstances is entitled to recover compensation in terms of, and subject to the provisions of s. 11 of the Agricultural Holdings Act, 1908, if he gives notice of his intention to claim compensation at any time not less than two months before the determination of the tenancy. It is clear that the respondents are entitled to compensation from someone; the question is from whom? From the person who was the landlord at the end of the term or the person who was the landlord at the time when the notice to quit was given? The Act of 1914 refers back to the Act of 1908. That Act entitled a tenant at the determination of the tenancy, on quitting his holding, to obtain compensation for improvements from the landlord. "Landlord" is defined in s. 48 as "any person for the time being entitled to receive the rents and profits of any land." So that the purchaser of the land at the termination of the tenancy when the tenant has quitted the holding is the person to pay compensation under s. 1 of the Act of 1908. If any question were raised as to who was owner for the time being as between the legal owner and the person entitled in equity to the rents and profits under a contract to purchase but before conveyance of the legal estate, *Allen v. Inland Revenue Commissioners* (1) would show that an owner is not necessarily a legal owner.

I take it as clear then that the purchaser at the expiration of the tenancy is the person to pay compensation under s. 1. Sect. 11 gives further compensation in certain circumstances to the tenant for loss or expense directly attributable to his quitting the holding "in addition to the compensation (if any) to which he may be entitled in respect of improvements." Sect. 11 does not say expressly who is to pay this additional compensation, but the frequent repetition of the word "landlord" shows beyond doubt that the landlord is the person to pay. Therefore unless the context otherwise requires, the person entitled to receive the rents and profits at the deter

(1) [1914] 2 K. B. 327.

mination of the tenancy must pay this additional compensation. When compensation is claimed under the Act of 1914 it may be recovered in terms of and subject to the provisions of s. 11 of the Act of 1908. Therefore also the person who is entitled to receive the rents and profits at the determination of the tenancy is the person to pay compensation under the Act of 1914. In the present case that person is the appellant. There has been no change of ownership since that date, and therefore it is not necessary to decide whether a landlord fixed with a liability to pay compensation can before payment pass the burden on to some other person. When that point has to be decided the opinion of Joyce J. in *In re Lord Derby's Contract* (1) that a purchaser is deemed to have notice of the tenant's claim for compensation ought not to be overlooked.

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Scrutton L.J.

ATKIN L.J. I agree. The fallacy in the argument for the appellant consists in assuming that the object of the Legislature in passing the Act of 1914 was to punish the landlord for wrongfully disturbing the tenant in possession and in construing the language so as to achieve that object. It is not a good rule of construction to search elsewhere for the object of the Legislature when the words of the enactment are plain; but if it were necessary to do this, I should say that the purpose of the Act was clearly not to punish the landlord but to compensate the tenant by means of the procedure of the Act of 1908. The landlord pays compensation on the determination of the tenancy. The landlord is the person for the time being entitled to receive the rents and profits of the land; it would seem to follow that the person entitled to receive the rents and profits of the land at the determination of the tenancy or when payment is to be made is the person to pay compensation. The appellant answers that description. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitor for appellant: *H. A. Sims for Middleton & Gutteridge, Dunstable.*

Solicitors for respondents: *Pettitt, Walton & Co.*

(1) (1911) 56 Sol. J. 71.

W. H. G.

C. A.

[IN THE COURT OF APPEAL.]

1920

June 1.

SHARP *v.* RICHARDSON AND COMPANY.

Employer and Workman—Compensation—Redemption—Weekly Payment—Redemption by lump Sum—Agreement—Recording Memorandum—Inadequacy of Sum—Standard of Adequacy—Discretion of Judge to refuse to record—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sch. I., para. 17; Sch. II., para. 9 (d).

The applicant, a woman aged fifty-nine, met with an accident arising out of and in the course of her employment with the respondents which resulted in the loss of her right arm and injury to her left hand. She was paid by the respondents a sum of 4s. 10½d. a week compensation. An application under Sch. I., para. 17, was made by the respondents for redemption of this weekly payment by the payment of a lump sum of 113l. 2s. 5d., but was withdrawn, and an agreement was entered into between the parties for redemption by the payment of the 113l. 2s. 5d. The 113l. 2s. 5d. represented the redemption value of 4s. 10½d. a week calculated on the 75 per cent. basis fixed by Sch. I., para. 17. The respondents applied to the Registrar under Sch. II., para. 9 (d), to record a memorandum of this agreement. The Registrar refused to do so on the ground that the sum was inadequate and referred the matter to the county court judge, who upheld the Registrar's view. On appeal:—

Held, that on an application under Sch. II., para. 9 (d), to record a memorandum of an agreement the county court judge in determining the question of adequacy of amount was not bound by the standard fixed by para. 17 of Sch. I., but that the two paragraphs were to be read separately and had different functions, para. 7 dealing with cases of compulsory redemption by the employer and para. 9 with cases of agreement between the parties.

APPEAL from an award of the judge of the Kendal County Court, sitting as arbitrator under the Workmen's Compensation Act, 1906.

On January 3, 1919, the applicant, a woman aged fifty-nine, met with an accident arising out of and in the course of her employment with the respondents, which resulted in the loss of her right arm and injury to her left hand. She was paid by the respondents a sum of 4s. 10½d. a week as compensation.

An application under Sch. I., para. 17, of the Workmen's Compensation Act, 1906, was made by the respondents for redemption of this weekly payment by the payment of a lump

sum of 113*l.* 2*s.* 5*d.* but was withdrawn, and an agreement dated November 25, 1919, was entered into between the parties for redemption by the payment of the 113*l.* 2*s.* 5*d.* The 113*l.* 2*s.* 5*d.* represented the redemption value of 4*s.* 10½*d.* a week calculated on the 75 per cent. basis under Sch. I., para. 17.

The respondents applied to the Registrar under Sch. II., para. 9 (*d*) (1), to record a memorandum of this agreement. The Registrar refused to do so on the ground that the sum was inadequate and referred the matter to the county court judge. The county court judge, after hearing the evidence of the applicant, who stated that she did not want a lump sum, and the report of a medical referee to the effect that the applicant's condition was not stable, upheld the Registrar's decision. In giving judgment the learned county court judge stated that the parties seemed to have misapprehended the provisions of the Workmen's Compensation Act. They had, it was evident from the wording of the agreement, made

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(1) Workmen's Compensation Act, 1906, Sch. II., para. 9: "Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by Rules of Court, by the committee or arbitrator, or by any party interested, to the registrar of the County Court who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a County Court judgment.

Provided that:—

(*d*) where it appears to the registrar of the County Court, on any information which he considers sufficient, that an

agreement as to the redemption of a weekly payment by a lump sum, or an agreement as to the amount of compensation payable to a person under any legal disability, or to dependants, ought not to be registered by reason of the inadequacy of the sum or amount, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge who shall, in accordance with Rules of Court, make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just. . . ."

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a calculation based on the provisions of Sch. I., para. 17—the compulsory redemption paragraph. They had determined themselves that the incapacity was permanent, which was the very question the Court had primarily to determine, and then apparently contended that the amount—namely, 113*l.* 2*s.* 5*d.*, the scale amount when the incapacity was permanent—was adequate, and that the agreement ought to be recorded under Sch. II., para. 9. Apart from the authorities mentioned below, he did not think it was clear that Sch. II., para. 9, was in any way dependent on Sch. I., para. 17. The Irish case of *Swannick v. Congested Districts Board Trustees* (1) decided that the county court judge in determining the question of adequacy ought not to be guided by the principle laid down in para. 17 of Sch. I. unless he was satisfied that the incapacity was permanent. It would appear therefore from that decision that he ought to be so guided if he thought the incapacity was permanent. The other authority generally quoted by the text writers on the subject—*O'Neill v. Anglo-American Oil Co.* (2)—did not appear to touch the question of the interdependency of the two paragraphs. He respectfully followed the Irish case and directed his mind to the question whether the woman's condition was stable: see *Calico Printers' Association v. Higham*. (3) He was advised by the medical referee that it was not. He found it was not, and consequently arrived at the conclusion that the incapacity was not permanent. The scale named in the paragraph had no application. The Court had therefore full discretion as to the amount even if the application were under Sch. I., para. 17, and certainly had under Sch. II., para. 9, on the facts of the present case he did not think that at the present time the recording of the agreement to take this small capital sum could be otherwise than detrimental to applicant, and he therefore refused to record the memorandum on the ground of inadequacy.

The employers appealed. The appeal was heard on June 7, 1920.

(1) (1912) 6 B. W. C. C. 449.

(2) (1909) 2 B. W. C. C. 434.

(3) [1912] 1 K. B. 93.

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Shakespeare for the appellants. There is no doubt that the compensation was calculated on the basis of total incapacity. It cannot be said that the amount here is inadequate if it is as much as the applicant could get if the incapacity was permanent. In estimating the amount to which the applicant is entitled the Registrar may have regard to what she would be entitled to if the incapacity were permanent. *Swannick v. Congested Districts Board Trustees* (1), on which the county court judge relied, has no bearing on the present case. All that that case decided was that in determining the adequacy or inadequacy of a lump sum agreed to be paid in redemption of a weekly payment under the Act, the county court judge ought not to be guided by the principle laid down in para. 17 of Sch. I. unless he is satisfied that the incapacity of the injured workman is permanent. In *Calico Printers' Association v. Higham* (2) Fletcher Moulton L.J. said: "If the case comes under the latter portion of the section (i.e., Sch. I., para. 17), it is open to the arbitrator to award a larger amount than 75 per cent. of the actuarial value of the then existing weekly payment, if he comes to the conclusion that in the future the weekly payment will probably be increased." The county court judge has applied the decision in that case to a case where the workman is getting the maximum compensation. The case establishes the meaning of permanent incapacity. The additional weekly sum payable under the Workmen's Compensation (War Addition) Act, 1917 (7 & 8 Geo. 5, c. 42), s. 1, sub-s. 2, as amended by the Workmen's Compensation (War Addition) Amendment Act, 1919 (9 & 10 Geo. 5, c. 83), cannot be redeemed.

R. S. T. Chorley for the respondent. The county court judge was right in finding that the amount was inadequate. The application to record was made under para. 9 of Sch. II. That paragraph lays down no criterion as to amount, and the county court judge must make such order as he thinks right under the circumstances of the case. He must exercise a judicial discretion. Here the county court judge has acted under r. 51 of the Workmen's Compensation Rules, 1913-1917,

(1) (1912) 6 B. W. C. C. 449.

(2) [1912] 1 K. B. 93, 101.

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which lays down the procedure to be adopted in applications under Sch. II., para. 9 (d): see sub-r. 8. He carefully examined the applicant with a view to coming to a proper decision and was entitled to take into consideration the extremely low wages paid to her.

[LORD STERNDALÉ M.R. How does that affect the question?]

It affects the total sum. If she is given this small lump sum it will be too small to enable her to embark upon a business and she would only spend it. She prefers a small weekly sum which would at least provide her with bread. Sch. II., para. 9, has no connection with Sch. I., para. 17. This is a matter of agreement, and the county court judge is therefore entitled to consider whether the sum is adequate. Sch. I., para. 17, has no application to the present case. *Castle Spinning Co. v. Atkinson* (1) was decided under the Act of 1897, and the facts were not the same as in the present case.

[LORD STERNDALÉ M.R. The argument put against you really is that according to your contention the applicant can obtain more compensation for partial incapacity than for total permanent incapacity.]

In *Birmingham Railway Carriage Co. v. Round* (2) it was held that there was evidence upon which the county court judge could find that the incapacity of the workman was not permanent, and that being so the amount of the compensation was entirely in his discretion.

The county court judge was entitled to take into consideration the fact that the war additional weekly sum might be withdrawn at any time by the Government.

It is submitted therefore that the appeal ought to fail, (1.) because the county court judge has rightly exercised his discretion under Sch. II., para. 9, and (2.) if regard is to be paid to Sch. I., para. 17, because he had under that paragraph an unfettered discretion in determining the amount.

Shakespeare in reply referred to *Johnston v. Liston & Co.* (3) and *Williams v. Ministry of Munitions.* (4)

(1) [1905] 1 K. B. 336, 339.

(2) (1917) 10 B. W. C. C. 612.

(3) [1920] 1 K. B. 99.

(4) (1919) 12 B. W. C. C. 213.

LORD STERNDALE M.R. We have had a great deal of difficulty about this case, but on the whole I do not see any reason why we should interfere with the learned county court judge's judgment.

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The applicant was a woman nearly sixty years of age who had been paid very low wages. I attach no importance to that, and I do not say anything about the lowness of the wages. There may have been many circumstances connected with her contract of service that we do not know. But the result was that, having had a very bad accident by which she lost one arm, she was receiving a sum of a little less than 5s.—namely, 4s. 10½d. a week as compensation. The employers wished to redeem that weekly payment, and to do so by an agreement, and they tendered a memorandum of agreement to the Registrar of the county court for the sum of 113*l.* 2*s.* 5*d.*, which it is alleged would be the sum which would be sufficient to obtain an annuity for the applicant equal to 75 per cent. of the annual value of her weekly payment. The Registrar refused to record the memorandum of agreement on the ground that the sum was inadequate, and referred the matter to the judge, who took the same view. The application to record was made under para. 9 (*d*) of Sch. II. to the Workmen's Compensation Act, 1906, which provides that: "Where it appears to the Registrar of the County Court, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum, or an agreement as to the amount of compensation payable to a person under any legal disability, or to dependants, ought not to be registered by reason of the inadequacy of the sum or amount, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge who shall, in accordance with rules of Court, make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just." If that provision stood alone, I suppose there could not be any doubt that the Registrar

C. A. would have a discretion, and so would the county court judge,
1920 to say whether in his opinion the amount was adequate.

SHARP But what is contended is that that provision does not stand
v. alone because there is para. 17 of Sch. I., which provides
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SON & Co. not less than six months, the liability therefor may, on
Lord Sterndale application by or on behalf of the employer, be redeemed
M.R. by the payment of a lump sum of such an amount as, where
the incapacity is permanent, would, if invested in the purchase
of an immediate life annuity from the National Debt Com-
missioners through the Post Office Savings Bank, purchase
an annuity for the workman equal to seventy-five per cent.
of the annual value of the weekly payment, and as in any other
case may be settled by arbitration under this Act, and such
lump sum may be ordered by the committee or arbitrator
or judge of the County Court to be invested or otherwise
applied for the benefit of the person entitled thereto:
Provided that nothing in this paragraph shall be construed
as preventing agreements being made for the redemption
of a weekly payment by a lump sum." And it is said that that
paragraph in effect makes a standard of adequacy which
must be applied under the provisions of para. 9 (d) of
Sch. II., because under Sch. I., para. 17, the liability may be
redeemed where the incapacity is, as it is alleged to be in the
present case, permanent, by the payment of such a sum as
will yield an annuity equal to 75 per cent. of the annual value
of the weekly payment, and that is the outside that can be
obtained, and consequently that if the incapacity is not
permanent, the payment cannot be more and must be less
than the amount that would be payable if the incapacity
were permanent. Therefore it is said that the county court
judge cannot as a matter of law, under Sch. II., para. 9 (d),
say that a sum which in the case of total and permanent
incapacity would be a sufficient sum to entitle the employer
to redeem under Sch. I., para. 17, is inadequate. I do not
agree with that contention, and for this reason. I think that
the two paragraphs must be read separately. In my opinion
the learned county court judge has a right to look at the

agreement and say whether in his opinion the sum thereby provided is adequate or inadequate. This provision in Sch. I., para. 17, is made with regard to different conditions and different circumstances. When the learned county court judge has looked at the agreement he may consider whether the case before him is one to which the maximum applies and whether or not the incapacity is in fact total and permanent. In the present case the learned county court judge has done so, and he has come to the conclusion that the incapacity is not total and permanent; and it is admitted that he can so find. But it is said that that does not matter if it be total and permanent; that the amount specified in Sch. I., para. 17, is the maximum; and that if the incapacity be not permanent, the amount must be less than the maximum. That may be right. I express no opinion as to whether it is so or not, but what I say is that in considering Sch. II., para. 9 (*d*), the learned county court judge is not bound to go back to Sch. I., para. 17, and examine the provisions of that paragraph. He may look at the agreement placed before him, and say whether in his opinion the amount thereby provided is adequate or not, and if he considers it inadequate he may refuse to record the memorandum of agreement. That does not however put an end to the employer's remedy. The employer may still if he pleases apply to the Court under Sch. I., para. 17, and he may then be able to show that in no case, under whichever branch of the paragraph the case falls, can the workman obtain more than that maximum amount therein mentioned as payable in the case of total and permanent incapacity.

I express no opinion whether a person can obtain more for partial than for permanent incapacity; all I say is that that is a matter which will have to be decided under Sch. I., para. 17, if the employer chooses to apply under that paragraph. But that at all events is not a matter which, in my opinion, the learned county court judge could decide under Sch. II., para. 9 (*d*). That paragraph has reference to the question whether the amount mentioned in the agreement is inadequate. He has a right to form his opinion

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C. A. on that point, and to leave the employer to abide by the
1920 result of his decision or to apply under Sch. I., para. 17.

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For these reasons I do not see any ground for interfering with the decision of the learned county court judge and I think that this appeal must be dismissed.

ATKIN L.J. I agree. It appears to me that these two paragraphs have two different functions. Para. 17 of Sch. I. is a paragraph which determines the amount of compensation which the workman is entitled to receive. Para. 9 of Sch. II. deals with the procedure and what is to be done in case the parties come to an agreement. The learned county court judge in the present case was merely dealing with the question of agreement, and under this Act the agreement was produced to him by which the parties purported to redeem the weekly payment. In respect of that matter the learned Registrar and the learned county court judge were entitled to take into consideration whether the amount thereby provided was adequate or not. I think by "adequate" is meant whether the amount is a reasonable substitute under all the circumstances of the case for the workman to take and that the learned county court judge was entitled to say that a lump sum of money which only purported to give to the applicant, instead of the weekly payment that she was receiving, three-quarters of that weekly payment, was not an adequate sum notwithstanding the fact that a different rule had been laid down under different circumstances in Sch. I., which deals with the compulsory powers of the employer. In the present case the learned county court judge has dealt with what appears to me to be a pure question of fact—the adequacy of the amount of compensation—and has come to the conclusion that this lump sum of money, which would only give to the applicant a sum which would produce an annuity of about 3s. a week, is not an adequate redemption of the sum of 5s. a week that she would be entitled to receive if she obtained an award.

It is said that the learned county court judge ought to have directed himself by reference to the provisions for compulsory

redemption under para. 17 of Sch. I., and it is therefore necessary to refer to those provisions. In substance that paragraph provides that where a weekly payment has been continued for not less than six months, the employer may then, against the will of the workman, redeem that payment by the payment of a lump sum of such an amount as, where the incapacity is permanent, would purchase an annuity which would be equal to 75 per cent. of the annual value of the weekly payment.

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The Court of Appeal have held that the word "permanent" in that paragraph means "permanent and stable"; in other words, that not only must the injury be a permanent injury but the earning capacity of the workman must be so definitely ascertained that in all reasonable probability if the weekly payment were continued it would neither be increased nor diminished. That is the first point. The second point is that the paragraph applies not merely to total incapacity but to partial incapacity, and a weekly payment in respect of that can be redeemed. The amount of the award is not, as I read this paragraph, calculated upon the amount which the workman is entitled to receive by way of weekly compensation, but upon the weekly payment actually made. And it may be that a weekly payment has been made which is less than the full amount that the workman would be entitled to receive, and where there is no permanent incapacity, then the rule as to 75 per cent. is not applied, and the amount has to be determined by arbitration. Where there is no permanent incapacity then according to *Calico Printers' Association v. Higham* (1) it is open to the arbitrator to award a larger amount than 75 per cent. of the actual annual value of the then existing weekly payment, if he comes to the conclusion that in the future the weekly payment will probably be increased. I refer to that case merely for the purpose of pointing out that there are a great many considerations under Sch. I., para. 17, which may have to be determined where the county court judge is dealing with the question of compulsory redemption, and I for my part

(1) [1912] 1 K. B. 93.

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decline to put any further restrictions. I decline to express or imply into any section of the Act words compelling him to put such a meaning upon it. The Act of Parliament is difficult enough to construe as it is, and I see no reason for restricting the discretion of the county court judge by reading into the provisions of the Act implied restrictions unless I am clearly satisfied that they ought to be there. I see no reason for reading those restrictions into para. 9 of Sch. II. Whenever an application in this case is made under Sch. I., para. 17, for compulsory redemption the learned county court judge may have to solve the different problems that will arise out of the offer that has been made in this case.

To my mind there was evidence in this case upon which the learned county court judge could find that the sum provided by this agreement was not adequate, and upon which therefore he was entitled to decline to register this memorandum of agreement. I agree therefore that this appeal should be dismissed.

YOUNGER L.J. I am of the same opinion, and I would only say that it is to me a satisfaction to find the true view of Sch. II., para. 9, of this Act to be that the learned county court judge in considering under that paragraph the adequacy or inadequacy of the lump sum provided by the agreement in question is not, as a matter of law, bound to direct himself with reference to the standard for compulsory redemption set up under para. 17 of Sch. I. of the statute. I am pleased to be able to come to that conclusion for the reasons stated by my learned Brothers and also for a reason which I will now myself state. In a compulsory redemption under para. 17 of Sch. I., it is an essential term that the redemption money may, if the committee or the arbitrator or the county court judge think fit, be ordered to be invested or otherwise applied for the benefit of the person entitled thereto. If para. 17 of Sch. I. and para. 9 of Sch. II. are to be read together, the effect, as we see in this case, would be that by merely including in the agreement the maximum sum which could have been obtained under para. 17 without inserting any

provision protecting that sum when received from immediate dissipation, you would deprive that person of that most salutary protection. I think however that the two paragraphs are quite separate, with the result that that protection is in no case withheld.

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Appeal dismissed.

Solicitor for appellants: *F. Berryman, for Arnold Greenwood & Co., Kendal.*

Solicitor for respondent: *B. Wilkinson, for Chorley & Toft, Kendal.*

W. I. C.

[IN THE COURT OF APPEAL.]

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EVERETT *v.* GRIFFITHS AND ANOTHER.

Feb. 17, 18,
19, 20;
Mar. 30.

[1919. E. 353.]

Lunacy—Pauper—Summary Order for Reception into Institution for Lunatics—Order by Chairman of Board of Guardians—Certificate by Medical Practitioner—Action for Negligence—"Satisfied"—Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 16, 20, 330—Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 25.

The chairman of a board of guardians, who was empowered by the Lord Chancellor under s. 25 of the Lunacy Act, 1891, to sign orders for the reception of persons as pauper lunatics in institutions for lunatics, signed an order, under s. 16 of the Lunacy Act, 1890, after inquiry and upon the certificate of a medical practitioner, for the reception of the plaintiff as a pauper lunatic in an asylum for lunatics. The plaintiff brought an action against the chairman and the medical practitioner for negligence in having respectively made the reception order and given the medical certificate. It was admitted that the defendants acted in good faith. At the trial before the Lord Chief Justice and a special jury, the jury were unable to agree upon the question whether the defendants acted with reasonable care. The Lord Chief Justice entered judgment for the defendants, upon the ground as regards the chairman that in making the order he was acting in a judicial capacity, and therefore no action lay against him for an act done in that capacity; and as regards the medical practitioner that his certificate was not the cause of the plaintiff's detention in the

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asylum, the detention being caused by the order of the chairman. Upon appeal:—

Held, as regards the chairman, by Banks and Scrutton L.JJ. (Atkin L.J. dissenting) without expressing an opinion upon the question whether the chairman, when acting under s. 16, was acting in a judicial capacity, that as the chairman was honestly "satisfied" that the plaintiff was, at the time when he made the reception order, a lunatic and a proper person to be detained, he was justified in making the reception order, and it was immaterial whether or not he used reasonable care in arriving at his decision; and that therefore he was entitled to judgment.

The decision of the Court of Appeal in *Harward v. Hackney Union* (1898) 14 Times L. R. 306, as to the meaning of the word "satisfied" in s. 20 of the Lunacy Act, 1890, applied to s. 16.

Held, as regards the medical practitioner, by Banks and Scrutton L.JJ. (Atkin L.J. dissenting), that he was entitled to judgment.

By Banks L.J. (without expressing an opinion upon the question whether the certificate was the cause of the detention): A medical practitioner who is "called in" by the justice or chairman under s. 16 of the Act and gives a certificate under the section is, apart from the ordinary relationship of doctor and patient, under a duty towards the alleged lunatic to act in good faith and with reasonable care, but, provided he has the qualification prescribed by the Act, the degree of skill possessed by him or brought to bear upon the examination of the alleged lunatic cannot be called in question; and as in the present case good faith was admitted and there was no evidence of a want of reasonable care on his part, he was entitled to judgment.

By Scrutton L.J.: The honest forming of an opinion expressed by a medical practitioner in a certificate given under s. 16 as evidence for the consideration of an independent authority, namely, the justice or chairman of the board of guardians, gives no cause of action against the medical practitioner to the person about whom the opinion is formed, even if the opinion is negligently formed, provided the opinion is honest, because there is no legal relation between the medical practitioner and the subject of the opinion, and also because the opinion is not so directly connected with the alleged damage as to be its cause, the action of an independent authority in making the reception order intervening.

By Atkin L.J.: A duty is owed to the alleged lunatic both by the justice of the peace or chairman of the board of guardians who makes a reception order under s. 16 of the Lunacy Act, 1890, and by the medical practitioner who gives the medical certificate required by the section before a reception order can be signed, to take reasonable care to satisfy themselves that the alleged lunatic is a lunatic before respectively signing the reception order or giving the medical certificate, and the duty of the medical practitioner includes a duty to exercise a reasonable degree of professional skill. If the medical certificate is wrongfully given, the damages for the detention of the alleged lunatic may be the natural and direct result of the wrong. In the present case there was evidence of want of care on the part of the

chairman and of the medical practitioner, and there ought to be a new trial.

By Atkin L.J.: A justice of the peace exercising the jurisdiction of making a reception order under s. 16 acts in an administrative capacity and not as a judge, and he is therefore not entitled to the immunity of a judge.

By the whole Court: Sect. 330, sub-s. 1, of the Lunacy Act, 1890—which provides that a person who signs or carries out or does any act with a view to sign or carry out an order purporting to be a reception order, or any report or certificate purporting to be a report or certificate under this Act, or does anything in pursuance of this Act, shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground “if such person has acted in good faith and with reasonable care”—does not deprive persons of any protection they may have apart from the section.

Harward v. Hackney Union 14 Times L. R. 306 followed.

The position of the chairman of a board of guardians who is empowered by the Lord Chancellor under s. 25 of the Lunacy Act, 1891, to sign orders for the reception of persons as pauper lunatics in institutions for lunatics, discussed.

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APPEAL from the judgment of the Lord Chief Justice at the trial of the action with a special jury.

The defendant Griffiths was at the material time the chairman of the Board of Guardians of the parish of St. Mary, Islington, in the County of London, and the defendant Anklesaria was the medical officer of the workhouse of the said parish situate at St. John's Road, Upper Holloway, and was a medical practitioner within the meaning of the Lunacy Act, 1890. The defendant Griffiths was duly empowered, under s. 25 of the Lunacy Act, 1891 (54 and 55 Vict. c. 65) (1), by the Lord Chancellor to sign orders for the reception of persons as pauper lunatics in institutions for lunatics.

The action was to recover damages against the defendants for, in substance, having unlawfully certified the plaintiff to be insane without good faith or reasonable care and on grounds which were totally inadequate, thereby causing

(1) Lunacy Act, 1891, s. 25: “If for the due administration of the Lunacy Acts, 1890 and 1891, in any union it appears to the Lord Chancellor desirable, he may by writing under his hand empower the chairman of the board of guard-

ians to sign orders for the reception of persons as pauper lunatics in institutions for lunatics, and every order so signed shall have effect as if made by a justice of the peace under the principal Act.”

C. A. him to be unjustly detained as a pauper lunatic in Colney Hatch lunatic asylum from March 27 to April 9, 1919.
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 GRIFFITHS. The defendants in their defence stated, so far as material, that in signing respectively the reception order and the medical certificate they acted in good faith and with reasonable care, and were not liable.

The facts were shortly as follows:—At the beginning of the year 1919 the plaintiff, who was twenty-three years of age, was residing with his parents at Islington. On March 21, 1919, upon a complaint made by his mother a police constable visited the house, and the constable summoned his inspector, and they came to the conclusion that the plaintiff ought to be placed under care and control, and acting under s. 20 of the Lunacy Act, 1890 (1) they removed him to the workhouse, where he was detained in the observation ward.

(1) The following are the material sections of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 14: “(1.) Every medical officer of a union who has knowledge that a pauper resident within the district of the officer is or is deemed to be a lunatic and a proper person to be sent to an asylum, shall, within three days after obtaining such knowledge, give notice thereof in writing to the relieving officer of the district, or, if there is no such officer, to an overseer of the parish where the pauper resides.

“(2.) Every relieving officer and every overseer of a parish of which there is no relieving officer, who respectively have knowledge, either by notice from a medical officer or otherwise, that any pauper resident within the district or parish of the relieving officer or overseer is deemed to be a lunatic, shall, within three days after obtaining such knowledge, give notice thereof to a justice having jurisdiction in the place where the pauper resides.

“(3.) A justice, upon receiving such notice, shall by order require

the relieving officer or overseer giving the notice to bring the alleged lunatic before him or some other justice having jurisdiction in the place where the pauper resides at such time and place within three days from the time of the notice to the justice as shall be appointed by the order.”

Sect. 16: “The justice before whom a pauper alleged to be a lunatic . . . is brought under this Act shall call in a medical practitioner, and shall examine the alleged lunatic, and make such inquiries as he thinks advisable, and if upon such examination or other proof the justice is satisfied . . . that the alleged lunatic is a lunatic and a proper person to be detained, . . . and if . . . the medical practitioner who has been called in signs a medical certificate with regard to the lunatic, the justice may by order direct the lunatic to be received and detained in the institution for lunatics named in the order, and the relieving officer, overseer, or constable who brought the lunatic before the justice . . .

Notice thereof was duly given by the relieving officer to the defendant Griffiths within three days under s. 14 of the

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shall forthwith convey the lunatic to such institution."

Sect. 20: "If a constable, relieving officer, or overseer is satisfied that it is necessary for the public safety or the welfare of an alleged lunatic with regard to whom it is his duty to take any proceedings under this Act, that the alleged lunatic should, before any such proceedings can be taken, be placed under care and control, the constable, relieving officer, or overseer may remove the alleged lunatic to the workhouse of the union in which the alleged lunatic is, and the master of the workhouse shall, . . . receive and relieve, and detain the alleged lunatic therein, but no person shall be so detained for more than three days, and before the expiration of that time, the constable, relieving officer, or overseer shall take such proceedings with regard to the alleged lunatic as are required by this Act."

Sect. 21: "(1.) In any case where a summary reception order might be made, any justice, if satisfied that it is expedient for the welfare of the lunatic, or for the public safety, that the lunatic should forthwith be placed under care and control, and if it appears to him that there is proper accommodation for the lunatic in the workhouse of the union in which the lunatic is, may make an order for taking the lunatic to and receiving him in that workhouse."

Sect. 28: "(1.) Every medical certificate under this Act shall be made and signed by a medical practitioner."

"(2.) Every medical certificate upon which a reception order is founded shall state the facts upon which the certifying medical prac-

titioner has formed his opinion that the alleged lunatic is a lunatic, distinguishing facts observed by himself from facts communicated by others; and a reception order shall not be made upon a certificate founded only upon facts communicated by others.

"(4.) Every medical certificate made under and for the purposes of this Act shall be evidence of the facts therein appearing and of the judgment therein stated to have been formed by the certifying medical practitioners on such facts, as if the matters therein appearing had been verified on oath."

Sect. 330: "(1.) A person who before the passing of this Act has signed or carried out or done any act with a view to sign or carry out an order purporting to be a reception order, or a medical certificate that a person is of unsound mind, and a person who after the passing of this Act presents a petition for any such order, or signs or carries out or does any act with a view to sign or carry out an order purporting to be a reception order, or any report or certificate purporting to be a report or certificate under this Act, or does anything in pursuance of this Act, shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground if such person has acted in good faith and with reasonable care.

"(2.) If any proceedings are taken against any person for signing or carrying out or doing any act with a view to sign or carry out any such order, report, or certificate, or presenting any such petition as in the preceding subsection mentioned, or doing anything in pursuance of this Act, such proceedings may, upon

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Act, and he attended at the workhouse on March 24 for the purpose of holding an inquiry under s. 16 as to whether the plaintiff (who was throughout treated under the sections of the Act relating to pauper lunatics) was a proper person to be detained as a lunatic. Acting under that section he called in as a medical practitioner the defendant Dr. Anklesaria, the medical officer of the union, whose salary covered any work which he might be called upon to do in connection with examining and certifying persons alleged to be insane. Griffiths heard the evidence on oath of the plaintiff's mother and of the police constable. The plaintiff was then called in and questions were put to him; he was not asked whether he wished to call any evidence, and he was sent back to the observation ward. Dr. Anklesaria, who had seen the plaintiff on several occasions since the latter had been in the workhouse, and had examined him, gave a certificate, dated March 24, 1919, in accordance with form 8 in the second schedule to the Lunacy Act, 1890, stating that he had personally examined the plaintiff and had come to the conclusion that he was a person of unsound mind and a proper person to be taken charge of and detained under care and treatment, giving the grounds on which he had formed that conclusion. On March 25, 1919, Griffiths signed an order in accordance with form 12 in the second schedule to the Act, stating that having called to his assistance Dr. Anklesaria and being satisfied that the plaintiff was in such circumstances as to require relief for his proper care and maintenance, and that he was a lunatic, and was a proper person to be taken charge of and detained under care and treatment, he thereby directed the superintendent of Colney Hatch asylum to receive the plaintiff as a patient into the asylum. On March 27, the plaintiff was removed to Colney Hatch asylum, where he remained until April 9, when he escaped, and not having been recaptured within fourteen

summary application to the High Court or a judge thereof, be stayed upon such terms as to costs and otherwise as the Court or judge may

think fit, if the Court or judge is satisfied that there is no reasonable ground for alleging want of good faith or reasonable care."

days he could not, by s. 85 of the Act, be detained except under a fresh reception order.

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The present action was thereupon brought. At the trial it was admitted that the defendants acted in good faith, and the only question for the jury was whether the defendants acted with reasonable care in respectively making the reception order and signing the medical certificate. At the close of the plaintiff's case it was submitted on behalf of the defendants that the action was not maintainable, and that there was no evidence of want of reasonable care in either defendant. The Lord Chief Justice said that he would reserve his decision and take the verdict of the jury upon the question whether the defendants had exercised reasonable care. Both sides called medical evidence, and the jury were unable to agree and were discharged.

The Lord Chief Justice then entered judgment for the defendants, on the ground, as regards the defendant Griffiths, that he was exercising a judicial authority and no action lay against him in respect of a judicial act; and as regards the defendant Anklesaria, upon the authority of *Thompson v. Schmidt* (1), that his act in signing the medical certificate was not the direct cause of the plaintiff's detention, the independent act of the defendant Griffiths in making the reception order intervening and being the cause of the detention.

The plaintiff appealed.

The Plaintiff in person. At common law a person could not lawfully be detained on mere suspicion of being a person of unsound mind. Only if he was in fact of unsound mind could the detention be justified: *Fletcher v. Fletcher*. (2) In other cases the detention was an act of trespass. Those who would detain a person who is not a lunatic must show some justification by statute.

First, as to the defendant Griffiths. He is not in the position of a judge of a superior Court of record, where his acts done in his capacity of judge cannot be called in

(1) (1891) 56 J. P. 212.

(2) (1859) 1 E. & E. 420.

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question : *Anderson v. Gorrie*. (1) His position at the highest is that of a magistrate with a limited jurisdiction. If without jurisdiction he detains a person he is liable in trespass : *Groome v. Forrester* (2) ; *Davis v. Capper* (3) ; *Prickett v. Gratex* (4) ; *Ratt v. Parkinson* (5) ; *Daubney v. Cooper* (6) ; *Tate v. Chambers* (7) ; *Houlden v. Smith*. (8) If he has a justification he must show it : *Mostyn v. Fabrigas*. (9) He relies upon ss. 14 and 16 of the Lunacy Act, 1890, as justifying him ; but his jurisdiction under those sections is conditional upon his exercising it in good faith and with reasonable care. That is the effect of s. 330 of the Act. Further, whatever may be the protection afforded to a justice of the peace, s. 25 of the Lunacy Act, 1891, does not give the same protection to the chairman of the board of guardians. It only provides that his order shall have the same effect as if made by a justice of the peace under the principal Act. It therefore only gives validity to an order properly made.

The same considerations apply to the defendant Anklesaria. A medical man, as such, may not detain a person who is not a dangerous lunatic : *Anderdon v. Burrows* (10) ; *Scott v. Wakem*. (11) He can only justify himself under s. 330 if he acts in good faith and with reasonable care. As to what constitutes reasonable care on the part of a medical man, the summing up of Crompton J. in *Hall v. Semple* (12), cited with approval by Lord Coleridge C.J. in *Reg. v. Whitfield* (13), shows the degree of care that is requisite : " Take me, then," said Crompton J., " as telling you, in point of law, that if a medical man assumes under this statute"—8 & 9 Vict. c. 100—" the duty of signing such a certificate, without making, and by reason of his not making, a due and proper examination, and such inquiries as are necessary, and which a medical man under such circumstances ought to make

(1) [1895] 1 Q. B. 668.

(2) (1816) 5 M. & S. 314.

(3) (1829) 10 B. & C. 28.

(4) (1846) 8 Q. B. 1020.

(5) (1851) 20 L. J. (M. C.) 208.

(6) (1829) 10 B. & C. 237.

(7) (1834) 3 N. & M. 523.

(8) (1850) 14 Q. B. 841.

(9) (1774) 1 Cowp. 161, 172 ;
1 Sm. L. C. (12th ed.) 674.

(10) (1830) 4 C. & P. 210.

(11) (1862) 3 F. & F. 328.

(12) *Ibid.* 337, 354, 355, 365.

(13) (1885) 15 Q. B. D. 122, 137.

and is called on to make, not in the exercise of the extremest possible care, but in the exercise of ordinary care, so that he is guilty of culpable negligence, and damage ensue ; then that an action will lie, although there has been no spiteful or improper motive, and though the certificate is not false to his knowledge " " The question is, whether there has been a neglect of that duty which a person in a case of this kind owes, not to interfere in a matter which touches the liberty of his fellow-citizen without taking due care and making a careful examination and inquiry ? " The evidence shows that the defendants did not exercise the degree of care necessary to excuse them. *Thompson v. Schmidt* (1), on which the Lord Chief Justice relied in support of his decision, is not an analogous case. There the relieving officer was called upon to act upon an emergency under s. 20 of the Lunacy Act, 1890, and to remove the plaintiff to the workhouse, where the detention could only be for three days, and the relieving officer asked for a doctor's certificate before exercising his powers under that section. He might have acted without any medical certificate. The certificate was clearly not the direct cause of the detention. Every judgment must be read as applicable to the facts : per Lord Halsbury L.C. in *Quinn v. Leathem* (2). In a case where the detention is of a permanent nature the justice of the peace (or the chairman of the board of guardians) and the medical practitioner must both act together. Each must exercise reasonable care, and if he does not he is liable to an action. The reception order and the medical certificate are conjoined in ss. 16, 28, 35, 37, 82 and 285 of the Act of 1890, showing that both are necessary for the permanent detention of a lunatic. Rule 8 (3.) of the Rules of 1895 (made under s. 338 of the Act of 1890) also couple the reception order and the medical certificate together. Sects. 16 and 28 in particular give the medical certificate a definite status under the Act. The Lord Chief Justice was therefore wrong in holding that the medical certificate was not the cause of the plaintiff's detention.

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(1) 56 J. P. 212.

(2) [1901] A. C. 495, 506.

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To hold that a medical practitioner is not liable for giving a certificate carelessly where the liberty of the subject is in question would involve grave consequences. The proceedings are practically in camera, and the deterrent effect of publicity is absent.

[*Rex v. Palmer* (1); *Calder v. Halket* (2); *Sharp v. Wakefield* (3); and *Royal Aquarium Society v. Parkinson* (4) were also cited.]

Rawlinson K.C. and *Sydney Davey* for the defendants. The good faith of the defendants was admitted, and there was no evidence of any want of care on the part of either defendant.

But apart from that, the chairman of the board of guardians, empowered under s. 25 of the Lunacy Act, 1891, to sign reception orders, is in the position of a judge, and his acts, even if malicious, are absolutely privileged. In *Hodson v. Pare* (5) it was held that the "judicial authority"—which expression by s. 9 of the Lunacy Act, 1890, includes a justice of the peace—to whom an application is made on petition, under s. 4, sub-s. 2, and s. 6 of the Act of 1890, for an order for the reception and detention of a lunatic, is acting judicially, and consequently defamatory statements made in the course of the proceedings are not actionable. That applies to the present case. There the hearing was under s. 6, where it is not necessary for the justice to examine the alleged lunatic; here the hearing is under s. 16, where it is necessary for the justice to examine the alleged lunatic. The proceedings under s. 16 are quite as judicial as those under s. 6. A judge, whether he be a judge of the High Court, or of a county court, or a justice of the peace, or any other judicial officer, is not liable to be sued in respect of any act done in his judicial capacity: *Scott v. Stansfield* (6); *Anderson v. Gorrie* (7); *Law v. Llewellyn* (8); *Kemp v. Neville* (9); *Cave v. Mountain* (10); *Pappa v. Rose* (11)

(1) (1761) 2 Burr. 1162.

(2) (1840) 3 Moo. P. C. 28.

(3) [1891] A. C. 173, 179.

(4) [1892] 1 Q. B. 431.

(5) [1899] 1 Q. B. 455.

(6) (1868) L. R. 3 Ex. 220.

(7) [1895] 1 Q. B. 668.

(8) [1906] 1 K. B. 487.

(9) (1861) 10 C. B. (N. S.) 523.

(10) (1840) 1 Man. & G. 257.

(11) (1871) L. R. 7 C. P. 32.

But even if the defendant Griffiths was not a judge, he was in the position of a person intrusted by statute with judicial powers, and as he acted honestly he is not liable, and is entitled to all the protection of a justice. Under s. 16 the justice must, before making the reception order, be "satisfied" that the alleged lunatic is a lunatic and a proper person to be detained. "Satisfied" means honestly satisfied, and it is immaterial that he did not take reasonable care: *Harward v. Hackney Union*. (1) That case was decided on s. 20, but the same meaning must be given to the same word "satisfied" in s. 16. The defendant Griffiths was put in the position of a justice who had to exercise a discretion, and no action will lie against him in respect of the manner in which he honestly exercised the discretion: Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 4; Halsbury's Laws of England, vol. xxiii., tit. "Public Authorities and Public Officers," s. 685. The Act of 1848 is only declaratory of the common law: *Bassett v. Godschall* (2); Archbold's Justice of the Peace, 4th ed. (1846), vol. ii., p. 43. The defendant Griffiths need not rely upon s. 330 of the Lunacy Act, 1890, as that section merely gives an additional protection, and it does not deprive either defendant of any protection he may have apart from the section: *Harward v. Hackney Union*. (1) [*Gelen v. Hall* (3); *Reg. v. Whitfield* (4); and *Royal Aquarium Society v. Parkinson* (5) were also cited.]

With regard to the defendant Dr. Anklesaria, he is not liable, whether the action is for false imprisonment or for negligence, inasmuch as his act did not cause the injury to the plaintiff. The act which caused the plaintiff's detention in Colney Hatch asylum was the independent act of the defendant Griffiths in making the reception order: *Thompson v. Schmidt*. (6) In *Hall v. Semple* (7) the medical certificate was, under the Lunacy Act then in force, the direct cause of the detention. Further, an action for negligence

(1) 14 Times L. R. 306.

(2) (1770) 3 Wils. 121.

(3) (1857) 2 H. & N. 379.

(4) 15 Q. B. D. 122.

(5) [1892] 1 Q. B. 431.

(6) 56 J. P. 212.

(7) 3 F. & F. 337.

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will not lie, because the defendant Anklesaria was under no duty to the plaintiff: *Thompson v. Schmidt*. (1) He was "called in" by the defendant Griffiths under s. 16 of the Lunacy Act, 1890, and he was in the position of a witness giving evidence in the course of judicial proceedings, upon whose evidence the defendant Griffiths might or might not have made the reception order. [*Tozeland v. West Ham Union* (2); *Shackleton v. Swift* (3); and *Williams v. Beaumont* (4); were also cited.]

The Plaintiff in reply. In *Thomas v. Churton* (5), Cockburn C.J. said that he was reluctant to decide, and would not do so until the question came before him, that, if a judge abuses his judicial office by using slanderous words maliciously and without reasonable and probable cause, he was not to be liable to an action. In *Harward v. Hackney Union* (6) the relieving officer had to act under s. 20 on an emergency, and the detention was only temporary not exceeding three days, and that case is no authority upon the meaning of the word "satisfied" in s. 16, under which there must be a formal hearing, and where the result may be the permanent detention of the alleged lunatic.

Cur. adv. vult.

March 30. BANKES L.J. read the following judgment:— In this case the appellant seeks to set aside a judgment entered in favour of the respondents. The action was tried before the Lord Chief Justice and a special jury. The jury failed to agree, and thereupon the Lord Chief Justice directed judgment to be entered for the respondents upon the ground that upon the facts as proved by the appellant no action lay against either respondent. The action was for damages for having wrongfully caused the appellant to be confined in a lunatic asylum. The respondent Griffiths was the person who made the reception order, the respondent Anklesaria was the doctor who gave the certificate which accompanied

(1) 56 J. P. 212.

(2) [1907] 1 K. B. 920.

(3) [1913] 2 K. B. 304.

(4) (1894) 10 Times L. R. 543.

(5) (1862) 2 B. & S. 475, 479.

(6) 14 Times L. R. 306.

the order. The Lord Chief Justice decided in favour of the respondent Griffiths upon the ground that in making the order he was acting in a judicial capacity, and consequently that no action lay against him for anything done by him whilst so acting. The decision in favour of the respondent Anklesaria was upon the ground that the certificate was not the cause of the appellant being confined in the asylum. The appellant has challenged both grounds in an able and exhaustive argument. The respondents support the learned judge's decision on both grounds; and they further contend that there was no evidence to go to the jury in support of the appellant's case. These contentions render it necessary to look very carefully into the provisions of the Lunacy Acts, 1890 and 1891, and into the numerous cases to which our attention has been called, because the points raised are undoubtedly of great importance not only to persons who like the appellant may be alleged to be of unsound mind, but to the community at large.

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In framing the procedure to be adopted before a person can be confined as a lunatic the Legislature has undoubtedly been confronted with a difficult and delicate task. The public interest has had to be considered as well as that of the individual alleged to be a lunatic or of unsound mind, and provision has had to be made for dealing with cases of emergency, and for authorizing persons who cannot in many cases have any special knowledge or experience of mental diseases to take the necessary steps to confine persons or to place them under control as lunatics. The law has been amended from time to time, and is now contained in the Lunacy Acts, 1890 and 1891. In speaking of one of the earlier Lunacy Acts Lord Dehman in *In re Shuttleworth* (1) speaks of the protection afforded by that Act as "double, against improper confinement and against danger from a lunatic being unrestrained." Lindley L.J. in *Reg. v. Whitfield* (2) in reference to the Lunatic Asylums Act, 1853, says: "The statute has given justices of the peace and medical men large powers; but the statute is based upon the theory

(1) (1846) 9 Q. B. 651, 658.

(2) 15 Q. B. D. 150.

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that they can be trusted.” Similar language can be found in other decisions upon the Lunacy Acts, and it is, I think, entirely applicable to the Acts of 1890 and 1891, and should be borne in mind in construing those Acts, and in endeavouring to ascertain the intention of the Legislature from the language used in them. It is in the true interpretation of these statutes that the answer to the many important and difficult questions which have been discussed during the argument is, in my opinion, to be found.

The case as against each respondent needs to be considered separately. There is one point however which is common to both cases and which therefore it is convenient to deal with at once. It depends upon the construction to be placed upon the provisions contained in s. 330 of the Act of 1890. The appellant contends that this section contains the key to the true interpretation of the Act so far as it affects his case against the respondents. The section is in these terms : [The Lord Justice read the section.] The argument on the one side is that the Legislature would not have inserted any special protection in favour of persons acting in good faith and with reasonable care unless it had been intended that all persons doing any of the things mentioned in the section should be under the duty of so acting, and that such a duty must therefore be implied. On the other side it is contended that the protection may be needed in cases where such a duty would be implied either from the language of the statute or from the relation of the parties, but that the mere fact that the section is expressed in general terms so as to cover all cases does not deprive persons of any protection they may have apart from the section. This latter view was the one taken by the Lord Chief Justice. It was the view taken by the Court of Appeal in *Harward v. Hackney Union* (1), and it is the view therefore which this Court must take. It is one in which I personally agree.

It becomes necessary therefore to look carefully into the provisions of the Lunacy Acts for the purpose of ascertaining what duty it is that the Act casts upon the respondents in

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reference in the one case to the making of the reception order and in the other to the giving of the medical certificate. It is material to notice at this point that the appellant in the Court below expressly disclaimed any imputation of want of good faith against either respondent. The appellant throughout the proceedings to which the respondents were parties was treated as a pauper lunatic, and dealt with under the sections of the Act of 1890 relating to pauper lunatics. He had in the first instance been treated as an urgent case under s. 20 and had been removed to the workhouse. It then became the duty of the relieving officer under s. 14, sub-s. 2, to give notice of the fact that the appellant was deemed to be a lunatic to a justice having jurisdiction in the place where the appellant resided. On this being done the section directs the justice to require the relieving officer to bring the alleged lunatic before him, and when this is done s. 16 provides for the subsequent procedure. The section requires the justice before whom a pauper alleged to be a lunatic is brought (*a*) to call in a medical practitioner, (*b*) to examine the alleged lunatic, (*c*) to make such inquiries as he thinks advisable; and it goes on to provide that if upon such examination or other proof the justice is satisfied that the alleged lunatic is a lunatic and a proper person to be detained he may, provided the medical practitioner who has been called in signs a medical certificate with regard to the lunatic, by order direct the lunatic to be received and detained in an institution for lunatics named in the order. Each of the respondents acted under this section, and each is called to account by the appellant for what he did in so acting.

I will deal first with the case of the respondent Griffiths. He is not a justice of the peace. In making the detention order he was acting under the special authority conferred upon him as chairman of the Islington Guardians by the Lord Chancellor under s. 25 of the Lunacy Act, 1891. This section is curiously worded. It provides that every order signed under the authority so given "shall have effect as if made by a justice of the peace under the principal Act."

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The section is silent upon the point of whether a chairman of guardians acting under an authority so given is himself to be considered as if he was a justice of the peace. The appellant urged that the effect of the section is to give the reception order the same force and effect as if made by a justice of the peace, but that it does not clothe a chairman of guardians with the same immunity as a justice of the peace acting under the principal Act from any consequences of making the order. I think that this argument is not well founded. The section must in my opinion be read as meaning that the same consequences are to follow the making of the order both to the person against whom the order is made and to the person by whom it is made as if the order had been made by a justice of the peace under the principal Act.

In the view I take of the decision of this Court in *Harward v. Hackney Union* (1), it becomes unnecessary to express any opinion upon the point upon which the learned Lord Chief Justice decided in favour of the respondent Griffiths. In that case the action was against a relieving officer who, acting under s. 20 of the Lunacy Act, 1890, had removed the plaintiff to a workhouse as an alleged lunatic. The jury found a verdict for the plaintiff on the ground that the relieving officer did not take reasonable care to satisfy himself that the plaintiff was a dangerous lunatic. The Court of Appeal was moved to set aside the judgment for the plaintiff upon the ground that, having regard to the terms of the section, the relieving officer was under no duty to the plaintiff to take reasonable care. The Court, consisting of A. L. Smith, Chitty, and Collins L.JJ., accepted this view of the section. A. L. Smith L.J. said: "The section said nothing about its being the duty of the relieving officer to take reasonable care to satisfy himself that it was necessary to remove the alleged lunatic. It said simply that he was to be satisfied that it was necessary to take that course. To say that he must be honestly satisfied was only another way of saying that he must be in fact satisfied. A dishonest satisfaction would be no satisfaction at all." This decision

(1) 14 Times L. R. 306, 307.

appears to me to be of great importance in the present case for two reasons : first, because it indicates that it is to the language of the section itself that recourse should be had for the purpose of ascertaining the duty laid upon anyone acting under the section ; and second, because it is a decision binding upon this Court as to the meaning of the expression "satisfied" as used in s. 20. I quite realize the distinction between the consequences of action taken under s. 20 and of action taken under s. 16. I see also that action may have on some occasions, though not on all, to be taken under s. 20 with less time for deliberation than if taken under s. 16. These points were fully elaborated by the appellant in his argument. I am unable however to accept the view that these differences justify this Court in drawing a distinction between the present case and *Harward's Case*.⁽¹⁾ The expression "satisfied" is the same expression in both sections. I cannot think that the Legislature intended to use the expression in different senses in the two sections, or to impose a different obligation upon the person who has to be satisfied according to whether he is acting under the one section or under the other. If therefore the respondent Griffiths was honestly satisfied (as it is admitted he was) that the plaintiff was at the time he made the reception order a lunatic and a proper person to be detained, he was justified under the statute in making the detention order, and it is immaterial whether or not he used reasonable care in arriving at his decision. This, I think, is the effect, so far as this Court is concerned, of the decision in *Harward's Case* (1), and it becomes unnecessary therefore to express any opinion whether the respondent Griffiths when acting under s. 16 was acting in a judicial or in an administrative capacity, or whether the Justices Protection Act, 1848, affects the question, or whether there is any protection at common law on which the respondent Griffiths as a justice of the peace can rely.

For the reasons I have given I think that the appeal against the decision in favour of the respondent Griffiths

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(1) 14 Times L. R. 306, 307.

C. A. fails and must be dismissed with costs. Before leaving
 1920 this branch of the case I would mention that in *Morris v.*

 EVERETT *Atkins* (1) and in *Welsh v. Duckworth* (2) the same view
 v. seems to have been taken of the effect of s. 20 as was taken
 GRIFFITHS. in *Harward's Case*. (3)
 —————
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I pass now to consider the case of the other respondent. It appears from the evidence that Dr. Anklesaria is a L.R.C.P. and M.R.C.S. He commenced practice in the year 1911, and in January, 1919, he was appointed medical officer of the Islington workhouse. We were told during the argument that he was appointed at an annual salary which included any work he might be called upon to do in connection with examining and certifying persons alleged to be insane. It appeared that he had certified as many as one hundred persons in the first three months after his appointment, and that he had in addition examined and refused to certify one or two persons every fortnight. Except for the experience he had gained in connection with these cases it did not appear that he had had any special experience in mental cases. The Lord Chief Justice has decided this branch of the case against the appellant presumably on the authority of the decision of this Court in *Thompson v. Schmidt*. (4) In that case the action was brought to recover damages for negligence in giving a certificate which led to a relieving officer removing the plaintiff to the Hoxton infirmary as an alleged lunatic under the powers conferred upon him by s. 20 of the Lunacy Act, 1890. The Court decided two points in that case: 1. That the defendant was under no duty to the plaintiff in reference to the certificate which he gave, and that consequently no action for negligence in the giving of that certificate would lie. 2. That, even assuming a duty and a breach of that duty, no action would lie because, to use Lord Esher's language, the confinement in the infirmary "was not the direct result of the defendant's act, but it was the direct and sole result of the act of the relieving officer." In dealing with this point Lopes L.J.

(1) (1902) 18 Times L. R. 628.

(2) Ibid. 633.

(3) 14 Times L. R. 306, 307.

(4) 56 J. P. 212, 213.

said: "The relieving officer may inform his mind in any proper way, and here he aided himself in exercising his discretion by asking the defendant for his opinion. There was thus the intervention of an independent and responsible third person between the plaintiff and the defendant, and the act of the defendant, therefore, was not the direct cause of the plaintiff being taken to the infirmary." Having regard to the view of the facts taken by the Court in that case I think that it is distinguishable from the present upon the ground that the defendant in that case was a mere volunteer, and his so-called certificate a mere statement of opinion in writing, whereas in the present case the respondent Anklesaria was called in to make the examination of the appellant which is prescribed by the statute and to give the certificate without which the reception order could not have been made.

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This view of the case renders it necessary to consider whether a medical man, who is called in to make an examination of an alleged lunatic under s. 16 of the Lunacy Act, 1890, and who after such examination gives a certificate under the statute, is under any and what duty to the person whom he examines and certifies. It may be that in some cases the ordinary relationship of doctor and patient may be created or may have previously existed between the doctor making the examination and the person examined, even though the doctor is "called in" under the section by the justice before whom the alleged lunatic is brought. In any such case the ordinary duty on the part of the doctor to exercise reasonable care and skill may well exist apart altogether from the provisions of the statute. That is not the case here. The respondent Anklesaria was called in because he was the doctor of the workhouse. I cannot accept the view that under those circumstances he escapes all responsibility to the appellant merely because he can in no sense be said to have been retained or employed by or on behalf of the appellant. I can find no English authority precisely in point. In *Pippin v. Sheppard* (1)

(1) (1822) 11 Price, 400.

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an action was brought against a surgeon for alleged negligence in treating one of the plaintiffs. There was a demurrer to the declaration on the ground that no retainer by or on behalf of the plaintiffs was alleged. The Court overruled the demurrer. The ground on which the Court proceeded was that put forward by the counsel, who supported the declaration, where he urged that (1): "In respect of persons in general, who profess skill in particular matters, and perhaps in the case of surgeons especially, there is a duty cast on them by the law to treat the objects of their art properly, and with, at least, an ordinary degree of skilfulness, at whosoever instance they may be employed, and by whomever they are to be remunerated." All the judgments proceed on the ground that, if the defendant undertook to treat the female plaintiff and injury resulted, the plaintiffs were entitled to maintain the action, and that it was immaterial who retained the defendant. Garrow B. in his judgment expressly refers to the case of surgeons retained by any of the public establishments. There are some dicta in the judgments in the case of *Shiells v. Blackburne* (2) which point in the same direction. In that case the action was brought claiming damages for negligence against a general merchant who had voluntarily and without reward undertaken to enter a parcel of goods at the Custom House. Two of the judges in that case draw the distinction between the case of the man who without special knowledge and qualification undertakes to do a thing voluntarily and gratuitously and the case of the man who has such special knowledge and qualification; and Heath J. instances the case of the surgeon as the case of the man who would be liable for negligence though acting gratis because his situation implies skill in surgery. In the Scottish case of *Urquhart v. Grigor* (3) all the judges held that a doctor called in by the procurator-fiscal to examine a woman in reference to a possible charge of murder against her was, to use the Lord President's words, under "a duty to the public, and

(1) (1822) 11 Price, 405.

(2) (1789) 1 H. Bl. 158.

(3) (1864) 3 M. 283, 287.

a duty to the accused, at least to the extent that he should not, by a malicious representation, or by gross or culpable negligence, imperil the character and liberty of the pursuer." Applying the reasoning underlying these decisions to the present case, I think that the respondent Anklesaria, by undertaking the examination of the appellant, did come under a duty to him, though the extent and limits of that duty must, I consider, be ascertained by reference to the terms of the statute by which the examination is prescribed.

Apart from the general considerations underlying the policy of the Legislature in reference to the treatment of persons deemed to be lunatics or of unsound mind as indicated in the general body of the statute, the particular parts of the statute which require special consideration are ss. 16, 28 and 317 and form 8 in the schedule. The material portions of s. 28 are sub-ss. 1, 2 and 4, which are as follows :— [The Lord Justice read the sub-sections.] It must be noticed that s. 16 says nothing as to what the medical practitioner shall do when called in by the justice except that he may sign a certificate. The examination referred to in the section is the examination by the justice. It is necessary to turn to form 8 in the second schedule to the Act to ascertain what it is that the statute requires of a person who gives a certificate under s. 16. He must state : 1. that he is a duly registered medical practitioner and in actual practice ; 2. that he has personally examined the alleged lunatic ; 3. that he has come to the conclusion that he is either a lunatic, an idiot, or a person of unsound mind (as the case may be) and a proper person to be taken charge of and detained under care and treatment ; 4. the grounds upon which he formed his conclusion, separating those grounds into (a) facts observed by himself ; (b) facts communicated by others ; 5. that before signing the certificate he has first read s. 317 of the Act. A consideration of these requirements leads me to the conclusion that, if the person making the examination is under any duty at all to the person examined by him (which as I have already stated I think he is), the duty must include a duty to act in good faith. It could

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hardly be less in a case where any wilful misstatement is by the terms of the statute in itself a misdemeanour. It must include also a duty to act with reasonable care in making the examination, because in a matter of such importance I cannot think that the Legislature could have contemplated any other examination than one conducted with such care as under the circumstances of each case would come up to the standard of what was reasonable.

Whether any duty of acting with reasonable skill as well as with reasonable care is imposed by the statute is a matter upon which I feel considerable doubt. To adopt the view that a medical man called in by a magistrate to express an opinion in reference to a person alleged to be a lunatic may be liable in damages for making an incorrect diagnosis, though he may have acted in perfect good faith and used all the care at his command, is to adopt a view which may render the working of the Act in many cases extremely difficult, if not impossible: a result which the Legislature may well have intended to avoid. The Lord President in a passage in his judgment in the case of *Urquhart v. Grigor* (1), part of which I have already referred to, expresses himself very forcibly on this point in reference to the general law apart from any statute. He says: "On the other hand, I hold that a medical man called on to give an opinion on a matter of opinion, and giving that opinion honestly, is not responsible for the soundness of it, nor for the consequences of it, or of any proceedings the authorities may take on it, if it be erroneous. If it is sought to make him responsible for such an opinion, it is not enough to allege that the opinion is erroneous, or that other medical men would arrive at a different result."

There appear to me to be several possible views as to the position of a medical man who gives a certificate under s. 16 of the Lunacy Act, 1890. 1. That he is merely in the position of a witness giving evidence as to the state of mind of the alleged lunatic, in which case he would not be liable in damages for any opinion he expressed. 2. That,

(1) 3 M. 287.

provided he acts in good faith and with reasonable care and has the qualification the Act requires, the Legislature did not intend that the degree of skill which he possessed or brought to bear upon his examination should be called in question. 3. That the relationship is that of doctor and patient. 4. That, whatever be the true view of his position, the certificate is not the cause of the patient being detained, as the act of the justice of the peace in making the detention order is a novus actus interveniens, which relieves the medical practitioner from any responsibility in damages for the detention. In the view I take of the evidence and of the pleadings it is not really necessary to express any opinion upon these difficult questions. The appellant has not, I think, in his statement of claim made any case of want of skill as distinguished from want of care against the respondent Anklesaria. Upon the assumption that this is perhaps too strict a view to take of the pleading and that it is necessary to express an opinion as to which of the above views is the correct one, I think that looking at the statute as a whole the second is the view that I should adopt. I think that the Legislature in making the special provisions it has done in reference to the certificate of the medical practitioner has had in mind some of the difficulties to which I have referred. I am led to this conclusion mainly by the form and requirements of the certificate. The medical practitioner is expressly warned against any misstatement which is wilful. He has to vouch the fact not only that he is duly qualified but that he is in actual practice. The certificate (and in this it differs from the certificate under the Act of 1853) is not to the effect that the person examined is a lunatic, but only as to the practitioner's conclusion on that point. The grounds on which the conclusion is formed are to be stated in order that the person for whose information the certificate is given may have an opportunity of judging for himself as to the soundness of the conclusion expressed. The whole proceeding under s. 16 is what Lindley L.J. in *Reg. v. Whitfield* (1) speaks of as a precautionary measure

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only, preliminary to the person certified being placed in the charge and under the care of persons specially qualified to deal with mental cases, and subject to the provisions in the Act contained as to the discharge of persons improperly detained. These considerations appear to me to point to the conclusion that the Legislature intended that a person having the qualifications laid down in the statute should be entitled to express an honest opinion arrived at with reasonable care on a matter of extreme difficulty and about which opinions might well differ without exposing himself to the risk of having his skill called in question before a jury, and being possibly mulcted in heavy damages.

It is not, I think, necessary to express any opinion upon the point upon which the Lord Chief Justice decided in favour of the respondent Anklesaria. Had it been necessary to do so the question would have arisen whether the very special connection between the certificate and the reception order, which is noticeable in the statute, would have brought the case within the principle of such decisions as *McDowall v. Great Western Ry. Co.* (1) and the passage in the judgment of Hamilton L.J. in *Latham v. Johnson*. (2) The reason why I need not express any opinion on this point is that I consider that there was no evidence proper to be submitted to the jury as against the respondent Anklesaria. I have read the whole of the evidence carefully, and I cannot find anything which in my opinion should have been submitted to the jury as evidence of a want of proper care on the part of this respondent. The appellant was admitted to the infirmary on Friday the 21st. The respondent visited him that night. On the next day the respondent made what was apparently a full and careful examination of the appellant. The respondent visited the appellant on the Sunday. In addition the respondent in the course of his rounds took occasion to watch the appellant through the peep-holes in the door provided for the purpose. The respondent had reports from the male attendant and the nurse, who were both apparently experienced persons. The respondent

(1) [1903] 2 K. B. 331.

(2) [1913] 1 K. B. 398, 413.

attended the inquiry on the Monday morning and heard the evidence of the police constable and of the appellant's mother, which I think it is important to notice was given after she had visited her son in the infirmary on the previous day. He had the information contained in the case paper. The appellant did not in his cross-examination of the respondent challenge the accuracy of the respondent's statements on these matters. I think that there is evidence that the respondent did not put into the certificate all that he had seen and heard which according to his evidence affected his judgment ; but the appellant can have no cause of complaint on the ground that matters which would have strengthened the certificate were omitted from it. The respondent may or may not have been mistaken in the opinion which he expressed in the certificate. He is, no doubt, entitled to say that the two experienced doctors from Colney Hatch who were called at the trial agreed with his view. Upon the construction which I place upon the requirements of the statute this is immaterial. I cannot see any evidence that the respondent Anklesaria failed to use reasonable care and such skill as he possessed in his examination of the appellant, and in arriving at the conclusion expressed in the certificate.

Under these circumstances I think that the appeal in his case also fails, and must be dismissed with costs.

SCRUTTON L.J. read the following judgment :—This action, which raises questions of general importance, was brought by Mr. Everett, a young man of twenty-three years of age, against Mr. Griffiths, chairman of the Islington Board of Guardians, and Mr. Anklesaria, medical officer to the Union. The cause of action was stated to be that the defendants certified the plaintiff as a lunatic without good faith or reasonable care. At the trial, as stated by the Lord Chief Justice in his summing-up, the plaintiff abandoned the allegation of bad faith. Counsel for the defendants submitted at the end of the plaintiff's case that there was no evidence to go to the jury on the question of reasonable care, and

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no obligation on the defendants towards the plaintiff to use reasonable care. The judge at the trial reserved his ruling in order to take the opinion of the jury, and he left to them the question whether the defendants used reasonable care in certifying. The jury failed to agree, and the Lord Chief Justice then entered judgment for the defendants; for the defendant Griffiths, who signed the order, on the ground that he did so in a judicial capacity and no action lay against him for acts done in such capacity; for the defendant Anklesaria, the doctor who signed the medical certificate, on the ground that his act was not the cause of the plaintiff's imprisonment, which resulted from the independent act of the chairman. The plaintiff appeals and asks for a new trial. If there were evidence to go to the jury on the question of reasonable care and skill, he is entitled to have the case argued on the assumption that the defendants have failed to use reasonable care and skill.

The first question for the Court is whether this assumption gives him a legal cause of action against either or both of the defendants. As to the nature of the proceedings which in fact took place there is no substantial dispute. A constable and a police inspector called in by the plaintiff's mother were satisfied that it was necessary for the public safety and the welfare of the alleged lunatic that he should be placed under care and control, and they removed him to the Islington workhouse. This was justified by s. 20 of the Lunacy Act, 1890. Under that section it was the duty of the constable or relieving officer to take further proceedings within three days. Under s. 14, sub-s. 2, it was the duty of the relieving officer, on becoming aware that the alleged lunatic was in the workhouse, to give notice thereof within three days to a justice having jurisdiction to sign a reception order for the Islington workhouse. Notice was accordingly given to the defendant Griffiths, who under s. 25 of the Lunacy Act, 1891, had been authorized by the Lord Chancellor as chairman of the board of guardians to sign orders for the reception of persons as pauper lunatics, the order to have the same effect as if made by a justice. This was

the first thing that Griffiths had to do with the case. If he were a justice his next step would be (a) under s. 14, sub-s. 3, of the Act of 1890 to require the relieving officer to bring the alleged lunatic before him; and under s. 16 (b) to call in a medical practitioner, (c) to examine the alleged lunatic and make such inquiries as he thought advisable, (d) on receiving a medical certificate stating the matters prescribed by ss. 28 to 34 of the Act of 1890, if he was satisfied that the alleged lunatic was a lunatic, to make an order for the lunatic to be detained in a named institution. The relieving officer and Griffiths accordingly arranged for an inquiry; Griffiths called in as medical practitioner Dr. Anklesaria, the medical officer of the Union, who examined the plaintiff and certified that for reasons stated he was in his opinion a person of unsound mind. Griffiths heard certain evidence not in the presence of the plaintiff, and afterwards himself examined the plaintiff. He then in good faith signed an order reciting that he was satisfied that the plaintiff was a proper person to be detained, which is the order complained of.

What is the standard of legal obligation to be applied to this transaction? Griffiths, as chairman of the guardians, was authorized by the Lord Chancellor to sign reception orders which should have the same effect as if made by a justice of the peace under the principal Act, 1890. In my opinion this puts the defendant Griffiths in the position of a justice of the peace as regards a reception order, subject to the same duties and restraints on his action as those imposed on a justice of the peace, and with the same powers and privileges, in regard to such an order. The justice by s. 16, under which the order is made, is to be "satisfied." The same word is used in s. 20 as to the action of a police officer or relieving officer, and in ss. 6 and 13 of the action of the "judicial authority." As far as s. 20 is concerned we have the guidance of two previous decisions of the Court of Appeal. In *Harward v. Hackney Union* (1) in 1898, the action was against the relieving officer, and the jury found

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that he did not take reasonable care to satisfy himself that the plaintiff was a lunatic. The Court of Appeal held that this was immaterial if the defendant was in fact honestly satisfied, and, there being no evidence from which a jury could infer he was not honestly satisfied, they set aside the verdict for the plaintiff and entered it for the defendant. In *Morris v. Atkins* (1) in 1902, another action against police officers acting under s. 20, the Court of Appeal again said that the question was whether the defendants were "satisfied" of the relevant fact, and set aside a verdict against them on the ground that there was no evidence on which the jury could find they were not satisfied. In the same year in *Welsh v. Duckworth* (2), another action against a police inspector under s. 20, Wills J. entered judgment for the defendant on the same ground, saying: "The moment it was granted that Captain Nott Bower's action was honest, it was impossible to come to any other conclusion than that he was satisfied." These decisions are under s. 20, but I cannot see any reason for applying a different standard to ss. 13 and 16, or putting a different meaning on the word "satisfied." As to s. 6, the decision of the Court of Appeal in *Hodson v. Pare* (3), which is binding on us, puts, in my view, even less legal burden on the justice. It follows that, if after considering all the facts including the method of his examination it is admitted that the defendant Griffiths was honestly satisfied that the plaintiff was of unsound mind his action is justified, and no proceedings can be taken against him because he did not use reasonable care. Honesty is admitted, and there is no evidence on which a jury could find he was not satisfied. The appeal as regards Griffiths therefore fails.

This conclusion renders it unnecessary to express a final opinion on a matter much argued before us, namely whether the action of the chairman or justice under s. 16 is that of a court or tribunal so that it is absolutely privileged, as in *Fray v. Blackburn* (4), *Kemp v. Neville* (5), *Dawkins v. Lord*

(1) 18 Times L. R. 628.

(2) Ibid. 633, 634.

(3) [1899] 1 Q. B. 455.

(4) (1863) 3 B. & S. 576.

(5) 10 C. B. (N. S.) 523.

Rokeby (1); or of a justice as an administrative body, as in *Royal Aquarium Society v. Parkinson* (2), and *Attwood v. Chapman* (3), where there is no absolute protection; and as to the effect of the Justices' Protection Act, 1848 (11 & 12 Vict. c. 44), ss. 1 and 4, and the previous common law protection as exemplified in *Bassett v. Godschall*. (4) The authorities collected in the arguments in *Gelen v. Hall* (5), with the cautious decision of the Court that they were "not at present prepared to hold the count bad," and in the note in Halsbury's Laws of England, tit. "Public Authorities and Public Officers," p. 332, note g, show that the question is one of great difficulty and public importance, on which I prefer to reserve my decision.

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Secondly, the defendant Anklesaria made the examination and signed the medical certificate which was part of the materials on which the chairman made the reception order. Was there a duty on him enforceable by action by the plaintiff to use reasonable care and skill? And was the failure in such duty on his part, if he did fail, the cause of the plaintiff's incarceration so as to give him a claim to damages?

The position of an ordinary medical practitioner is that he is not bound in law to certify as to any lunatic, but if he gives a certificate under s. 16 of the Act it is to be in the form 8 in schedule II., the effect of which is that he "personally examined and came to the conclusion that he is a lunatic and a proper person to be taken charge of and detained," on certain grounds which he is bound to state. This certificate is under s. 28, sub-s. 4, to be evidence of the facts therein appearing and of the judgment thereon stated to be formed, as if they were verified on oath. The certificate therefore is to have the effect of sworn evidence, and nothing will happen to the alleged lunatic unless the justice considering it and other matters is satisfied that the patient is a lunatic. The medical man appears to me to be

(1) (1873) L. R. 8 Q. B. 255;
(1875) L. R. 7 H. L. 744.
(2) [1892] 1 Q. B. 431.

(3) [1914] 3 K. B. 275.
(4) 3 Wils. 121.
(5) 2 H. & N. 379.

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in the same position as one who gives evidence before a jury on an inquisition of lunacy that the person being inquired into is of unsound mind. Nothing happens to such a person unless the jury find him lunatic. I cannot conceive in such a case an action being brought by the alleged lunatic against the doctor for the evidence he gave, if it was his honest opinion; or by any other person against the doctor because on his evidence the jury found the person sane, when in fact he was of unsound mind. In my view both points are determined by authority binding on us in the decision of the Court of Appeal in *Thompson v. Schmidt*. (1) There the wife of an alleged lunatic went to the relieving officer about her husband, who she alleged was a lunatic. The relieving officer asked for a certificate, and the wife went to their family doctor, who, without having seen the alleged lunatic for eighteen months, signed a certificate that he was of unsound mind, whereupon the relieving officer decided to take him to the infirmary. In an action by the alleged lunatic against the doctor the Court of Appeal set aside a verdict for the plaintiff and entered judgment for the defendant on two grounds: first, that the doctor did not give advice and treatment to the patient, but a written opinion to the relieving officer, and that he lay under no duty to the patient in regard to that opinion; secondly, that, as the independent action of the relieving officer imprisoned the patient, and not the opinion of the doctor, the action of the doctor was not the proximate cause of the damage of which the patient complained. Both these reasons appear to apply here. The doctor's certificate is given to provide evidence of his opinion before a justice, and does not itself impose any treatment on the plaintiff, or interference with his liberty. And the cause of the plaintiff's detention is the independent opinion of the justice, not the certificate of the doctor, though that may be evidence on which the justice after consideration acts. This latter is the Lord Chief Justice's reason for entering judgment for the defendant. As however the matter is of some little difficulty, I consider the matter further on principle.

A medical man practising his profession undertakes that he has the ordinary skill and knowledge necessary to perform his duty towards those resorting to him in that character: see *Seare v. Prentice*. (1) His liability does not depend on his receiving payment; submission to his surgical operation or medical treatment is a good consideration on which to found his undertaking. On this ground also I think it may not be necessary to establish privity of contract. Garrow B. in *Pippin v. Sheppard* (2), a case of a husband and wife suing a doctor retained by the husband, puts obiter the case of a patient in a poor law infirmary attended by the infirmary doctor, who he thinks could recover against the doctor for negligence; and probably in this case submission to the treatment of the doctor would give rise to the duty. But it appears to me the case is quite different when the doctor is not operating on or treating the patient, but expressing an opinion about his condition at the instance of another person and to guide that person in independent action. In *Pimm v. Roper* (3) a man injured in an accident sued a surgeon sent by the railway company to examine him for negligently stating his opinion of his condition to the patient, who of course permitted the examination; but Bramwell B. nonsuited the plaintiff, as he showed no contract or legal relation between them, and no injury sustained in consequence of neglect in examination. The Scottish case of *Urquhart v. Grigor* (4), a doctor examining a supposed criminal at the request of the police, and arriving at a wrong conclusion as to her physical condition after physical examination of her, apparently turns on Scottish pleading; but the Lord President said (5): “I hold that a medical man called on to give an opinion on a matter of opinion, and giving that opinion honestly, is not responsible for the soundness of it, nor for the consequences of it, or of any proceedings the authorities may take on it, if it be erroneous.” This is, I think, the same view as that taken in *Thompson v.*

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(1) (1807) 8 East, 348. (3) (1862) 2 F. & F. 783.
(2) 11 Price, 409. (4) 3 M. 283.
(5) Ibid. 287.

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Schmidt. (1) The case that has given me most cause for consideration is the nisi prius summing up in *Hall v. Semple*. (2) That, however, was under the earlier Act (8 & 9 Vict. c. 100, s. 45), under which the keeper of a licensed house could only detain on an order from some person not a judicial authority and two medical certificates, which apparently were not considered as evidence by anyone, but were in effect orders to detain. This may be the justification of the ruling; but so far as it subjects honest opinion to the scrutiny of a jury as to whether it was reasonably formed at the instance of the person about whom the doctor honestly forms an opinion, I disagree with it. "The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence:" per Lord Esher in *Le Lievre v. Gould*. (3)

What were the relations between Anklesaria and the plaintiff? 1. The plaintiff had no direct contract with Anklesaria on which he could sue. It was not a case of doctor and patient, or of voluntary submission to a doctor for surgical or medical treatment or physical examination. 2. The doctor, we were told, was by the terms of his engagement with the guardians bound to conduct these examinations, and, if he thought right, certify, for his salary without extra fee. This would involve a contract with the guardians to execute his duty with reasonable care and skill. But to this contract the plaintiff was no party, and he could not sue on it, there being no physical treatment as above stated, or control of his actions by the doctor directly. 3. Neither this doctor nor any other medical practitioner is compelled by statute to examine and certify. So that it is not a case of a statutory duty broken, with damage to a particular individual, the plaintiff. All that happens is that the justice making the order must have as part of his materials a certificate from a medical practitioner in a certain form, which he is not bound to act on, though without

(1) 56 J. P. 212.

(2) 3 F. & F. 337.

(3) [1893] 1 Q. B. 491, 497.

it he cannot make an order. If it were possible to imply any statutory obligation on the doctor, it would not in my opinion be higher than an implied obligation to be satisfied honestly; and it is conceded here that this condition was fulfilled. 4. What is really complained of here is an honest but careless expression of opinion defamatory of or detrimental to the plaintiff on which a third party acts to the detriment of the plaintiff. This would give no cause of action in libel, for there is privilege and no malice to defeat it; or in deceit, for there is no fraud, and the statement is not acted upon by the person claiming damages. And a certificate is not necessarily a dangerous thing, which involves a duty to those whom it may hurt to use reasonable care in its making, unless some contractual obligation exists between them. This was the ground of the decision of the Court of Appeal in *Le Lievre v. Gould*. (1) Bowen L.J. in that case (2) speaks of "the suggestion that a man is responsible for what he states in a certificate to any person to whom he may have reason to suppose that the certificate may be shown." "But," he continues, "the law of England does not go to that extent: it does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly." See also *Low v. Bouverie* (3), *Thompson v. Schmidt* (4), and *Banbury v. Bank of Montreal* (5).

It seems to me, therefore, that a doctor who voluntarily certifies under the Act of 1890, not at the request of the person examined, but as evidence for the guidance of an independent authority, incurs no liability to the person examined, as there is no legal relation between them. It may be useful to test this by considering the case of a doctor who is careless in certifying, but whose carelessness consists in failing to certify a real lunatic as such, though reasonable

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(1) [1893] 1 Q. B. 491. (3) [1891] 3 Ch. 82.
(2) Ibid. 502. (4) 56 J. P. 212.
(5) [1917] 1 K. B. 409, 438, 439.

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care would have detected his lunacy. If that lunatic immediately cuts his wife's throat, is the doctor under any legal liability to anyone for his carelessness? If not, it is curious that when he has undertaken to examine he is liable for carelessness which certifies, but not for carelessness which does not certify. The result of this view is that the question whether the doctor used reasonable care and skill is irrelevant in this case, as he was under no liability to the plaintiff so to act. His certificate is: "I examined and came to the conclusion." If he did this honestly, which is admitted here, I can see no ground for legal liability.

Reference was made to s. 330 as supporting the view that there was a legal obligation to act in good faith and with reasonable care. In my view this is a general section of protection to persons acting under the statute, stating that at least they should be under no greater liability than this, and should be entitled to have the action against them summarily stayed unless there was some evidence of want of good faith or of reasonable care. It did not in my opinion injure them by cutting down any greater protection they would otherwise at law enjoy. This is the view taken by the Court of Appeal in *Harward's Case* (1), and I agree with it. In *Williams v. Beaumont* (2) Wills J. was obviously of opinion that an action did not lie for negligently but honestly signing a certificate, though he and Collins J. stayed the action under s. 330, and the Court of Appeal affirmed their decision to stay. (3)

I am therefore of opinion that the honest forming of an opinion expressed in a certificate by a doctor called in by an independent authority, the certificate being given as evidence for the consideration of an independent authority, gives no cause of action to the person about whom the opinion is formed against the doctor, even if the opinion is negligently formed, provided the opinion is honest, because there is no legal relation between the doctor and the subject of the opinion on which to found an action, and because the

(1) 14 Times L. R. 306.

(2) 10 Times L. R. 489.

(3) Ibid. 543.

opinion is not so directly connected with the alleged damage as to be its cause, the action of an independent authority intervening.

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I desire to add, in view of the earnest argument addressed to the Court by the appellant to uphold the liberty of the subject against negligent arrest and imprisonment, that I trust the Court will always bear this in mind as part of its duty, but that the Court has also a duty to the State whose officers are entitled to protection. Laymen find it difficult to understand why a person who has had a case decided against him by a judge maliciously or negligently should not have an action against the judge. The judge is not privileged to be malicious or careless, but, as is well said by Channell J. in *Bottomley v. Brougham* (1), he is privileged from inquiry as to whether he is malicious. The reason is that to expose a judge to the risk of actions from every disappointed suitor, who is the more ready to allege malice the more ignorant he is, is to affect his efficiency and freedom as a judge doing a duty to the community. As is said by North C.J. in *Barnardiston v. Soame* (2), "They who are intrusted to judge ought to be free from vexation that they may determine without fear; the law requires courage in a judge, and therefore provides security for the support of that courage." Success in every action is no consolation to a defendant, who is exposed to costs and anxiety by the progress of such an action, and hampered by fear of such an action in the performance of his judicial duty. The same reasons appear to me to apply to the functions of those administering the lunacy laws. It is necessary not only to protect the individual who will suffer if wrongly imprisoned, but also the community who will suffer if real lunatics are not imprisoned, because the officers appointed to certify are afraid of the cost and annoyance of actions alleging improper certification, even if those actions fail. Very few lunatics think they are properly incarcerated, and most of them would enjoy an action in which the individual has

(1) [1908] 1 K. B. 584, 587.
(2) (1674) 6 How. St. Tr. 1063, 1096.

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“Great wits are sure to madness near allied,
 And thin partitions do their bounds divide.”

To leave the person who has to decide this difficult question as to the exact degree of unsoundness of mind which justifies immediate restraint, when he has acted honestly in forming his judgment, exposed to the threat of an action by the person restrained, to be decided by persons who did not see the alleged lunatic at the time he was incarcerated, but do see him when his condition may be different, by persons who may be struck by his cleverness without appreciating how near it may be to deranged intellect, seems to me calculated to hinder his properly executing the duty he owes to the community. This exemption is not giving him a licence to be negligent ; it is removing from him the threat of harassing actions. There is therefore a great deal to be said for a liberal protection to certifying authorities who act honestly. As Lindley L.J. said in *Reg. v. Whitfield* (1) : “The object of the statute is to enable justices to place under proper care and control persons whom they are satisfied are lunatic and require to be so placed. They have to act in cases of emergency and of great danger, as well as in other cases ; their measures are precautionary measures only ; if they make a mistake, it can soon be corrected. . . . The statute has given justices of the peace and medical men large powers ; but the statute is based upon the theory that they can be trusted.” I entirely agree, and would add that they and the community, as well as the individual they are appointed to deal with, should be protected by the Courts.

For these reasons, I think the Lord Chief Justice was right in entering judgment for the defendants, and that this appeal should be dismissed.

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ATKIN L.J. read the following judgment :—In this case the plaintiff has brought his action against the defendants alleging that by their action he was wrongfully imprisoned in Colney Hatch asylum as a lunatic. He sues the defendant Griffiths as the person signing the order under which he was detained, and the defendant Anklesaria as the medical practitioner who had certified him to be insane. His claim is for false imprisonment and alternatively for negligence causing the imprisonment. The case was tried before the Lord Chief Justice and a special jury. No issue was raised before the jury as to the plaintiff being a lunatic in fact, either at the trial or at the date of the imprisonment. Counsel for the defendants at the hearing expressly disclaimed that issue. The jury disagreed and were discharged, and the learned Lord Chief Justice entered judgment for the defendants. This case therefore raises the serious issue whether a sane man, who without reasonable care is imprisoned in an asylum, is by our law without redress against those whose negligence has caused him that terrible injury. The present determination is that he has no such redress, and I shall not apologize if I take some time in seeking to ascertain whether such determination is correct.

For the purpose of dealing with the legal questions it is unnecessary to state the facts at length. The plaintiff, a young man of twenty-three, was residing with his parents in Islington. On March 21, 1919, on a complaint made by his parents, a police constable visited the house, and having summoned his inspector, by direction of the latter conveyed the plaintiff to the Islington workhouse, where he was detained in the observation ward for lunatics of the infirmary. This detention took place in pursuance of s. 20 of the Lunacy Act, 1890. On March 24 the defendant Griffiths, who had authority to sign reception orders for lunatics, visited the infirmary for the purpose of determining whether he should

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direct him to be detained as a lunatic. He saw the record of a previous occasion three years before in which the plaintiff had been detained three days in the infirmary and then been discharged. He called in the infirmary doctor, the second defendant, and in his presence and the presence of the relieving officer heard evidence from the plaintiff's mother and from the police constable. The plaintiff was then brought in, some questions were put to him, he was not asked whether he desired to call any evidence or have the opinion of any other doctor, and he was sent back to the observation ward. The doctor signed a medical certificate that the plaintiff was of unsound mind, setting out in accordance with the Lunacy Act, 1890, the facts upon which he formed that opinion, facts which the plaintiff contended were quite inadequate to support the conclusion. The defendant Griffiths signed an order for the reception of the plaintiff in Colney Hatch asylum. On March 27 the plaintiff was taken to the asylum, whence he escaped on April 9. Having concealed himself for fourteen days he could not be detained except under a fresh reception order. No such order was made, and he thereupon commenced these proceedings.

The statement of claim, which is not drawn by counsel, is not drawn in terms of art, but I think that it formulates two grounds of claim against both defendants: 1. False imprisonment; 2. Negligence causing imprisonment. The latter issue was alone left to the jury; and, as the jury disagreed, if there be any evidence to support the allegation of negligence, the legal issue before us must be determined as though both defendants had been found guilty of negligence causing the injury complained of. The defendants contended that there was no evidence of negligence, a contention I shall deal with later.

The Lord Chief Justice, after discharging the jury, entered judgment for the defendants on the ground that the defendant Griffiths was sued in respect of a judicial act, and that he was entitled to complete immunity as a judge; and that the defendant Anklesaria did not by his certificate cause the

imprisonment, which was caused by the independent decision of the defendant Griffiths. On appeal counsel for the defendants relied upon the grounds adopted by the Lord Chief Justice, and further contended that, even if the defendant Griffiths were not entitled to the immunity of a judge, he was not liable to be sued, however careless he might be, provided that he was honestly satisfied that the plaintiff was a lunatic and a proper person to be detained; and that the defendant Anklesaria owed no duty to the plaintiff to take care. It was further contended that in any case there was no evidence of want of care on the part of either defendant.

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These contentions require some examination of the provisions of the Lunacy Acts, 1890 and 1891. The leading principle of the Act of 1890 is contained in s. 4, which provides that, subject to the exceptions mentioned in the Act, no person is to be detained as a lunatic in an institution for lunatics unless under a reception order made by the judicial authority thereafter mentioned. Sects. 4 to 10 provide for the making of such an order. The judicial authority is one of the justices specially appointed by quarter sessions, or a county court judge, or a stipendiary magistrate: s. 9, sub-s. 1; s. 10. In the exercise of his jurisdiction he is given the same powers as to summoning of witnesses, etc., as if he were acting in the exercise of his ordinary jurisdiction, and he is entitled to the assistance of the same officers: s. 9, sub-s. 2. The proceedings are initiated by petition accompanied by two medical certificates which are evidence of lunacy, and may be considered by the judicial authority to be sufficient to justify him in making a reception order forthwith: s. 6, sub-s. 1. If not satisfied he is to appoint a time for the consideration of the petition, and it is noteworthy that by s. 6, sub-s. 3, at that consideration the alleged lunatic, unless the judicial authority otherwise orders, has a right to be present, and that in any case a person appointed by the lunatic for that purpose has such right, together with the petitioner and the persons signing the medical certificates. If the alleged lunatic is ordered to be detained without having

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been previously seen by the judicial authority, he is entitled to insist upon being seen by some other judicial authority, and to be informed of such right: s. 8. If the petition is dismissed the judicial authority must state in writing to the petitioner his reasons for dismissing the petition: s. 7, sub-s. 1. In these proceedings one recognizes the provisions of a true judicial inquiry. A judicial authority expressly so called, a proceeding commenced by petition, a hearing, a power to compel the attendance of witnesses, opportunity for the alleged lunatic to be heard by himself or his representative, a decision granting the prayer of the petition, or, if refusing it, stating the grounds.

The remaining sections dealing with the making of reception orders appear to me to be dealing with orders made, not in the course of a judicial proceeding, but as administrative acts where prompt decision is required. There may be an exception in s. 13, where in cases where an alleged lunatic, not a pauper, is not under proper care and control, or is cruelly treated, the judicial authority may act upon information of a constable or relieving officer, and direct two medical practitioners to examine the alleged lunatic. The judicial authority is in such cases to proceed so far as possible as though a petition had been presented, and thus the case is brought within the class of cases dealt with on petition. Subject to this, in s. 11 we find provision for urgency orders, to be made by the husband, or wife, or relative of the alleged lunatic. No form of inquiry is suggested, and it would hardly be contended that a relative so acting is entitled to judicial immunity. Then follow ss. 13 to 22, a group of sections entitled "Summary Reception Orders." It is under these sections that the plaintiff was ordered to be detained. I have already dealt with s. 13. Sect. 14 deals with paupers resident within the district of a Union who are or are deemed to be lunatics. Every relieving officer obtaining knowledge of such a person is to give notice to a justice of the peace having jurisdiction in the district, who shall order the relieving officer to bring the alleged lunatic before him. Sect. 15 deals similarly with a person, whether pauper or not, wandering

at large within the district of a constable or relieving officer. The constable or relieving officer is to apprehend such person, and bring him before a justice; or the justice receiving information on oath as to the existence of any such person may order a constable or relieving officer to apprehend such person and bring him before him. By s. 17 a justice receiving information as to either of the class of persons mentioned in ss. 14 and 15 may examine the alleged lunatic at his own house or elsewhere, and proceed in all respects as if the alleged lunatic had been brought before him. Sect. 16 provides for the further proceedings of the justice. "The justice before whom a pauper alleged to be a lunatic or an alleged lunatic wandering at large is brought under this Act shall call in a medical practitioner, and shall examine the alleged lunatic, and make such inquiries as he thinks advisable, and if upon such examination or other proof the justice is satisfied in the first-mentioned case that the alleged lunatic is a lunatic and a proper person to be detained, and, in the secondly mentioned case, that the alleged lunatic is a lunatic, and was wandering at large, and is a proper person to be detained, and if in each of the foregoing cases the medical practitioner who has been called in signs a medical certificate with regard to the lunatic, the justice may by order direct the lunatic to be received and detained in the institution for lunatics named in the order. . . ."

It will be noticed that the responsibility for the ascertainment of the facts rests with the justice. There is no petition; the justice calls in the medical man, as to whom all the Act provides is that he shall sign a medical certificate "with regard to the lunatic;" there is no hearing; there is no opportunity for the alleged lunatic to appear by a representative, and there appears to be no power such as is given to the "judicial authority" by s. 9, either to summon witnesses, or to have the assistance of such officials as ordinarily assist a justice of the peace acting in the exercise of his ordinary jurisdiction. *Reg. v. Whitfield* (1) is in point. In proceedings taken under the similar provisions of the

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(1) 15 Q. B. D. 122.

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 1920 point was taken that the examination by the justices must
 EVERETT be made in such a way as to afford the alleged lunatic an
 v. opportunity of explaining his conduct and the appearances
 GRIFFITHS. against him. Lindley L.J. held that such a kind of exam-
 Atkin L.J. ination was unnecessary, and gives his reasons (1): "There
 is no trace in the statute of any difference in this respect
 between the various classes of lunatics with which it deals.
 Nothing approaching a judicial inquiry is requisite under
 s. 74"—an order by a relative accompanied by two medical
 certificates—"and the provision in s. 67 for examination of
 pauper lunatics by a clergyman and relieving officer or
 overseer of the poor shows to demonstration that in those
 cases anything like a judicial inquiry is quite out of the
 question. Moreover, the language of s. 68 does not point
 to anything like such an investigation as takes place under
 a writ de lunatico inquirendo. The object of the statute
 is not to enable justices to adjudicate a person to be non
 compos mentis, but to enable them to place under proper
 care and control persons whom they are satisfied are
 lunatic and require to be so placed. They have to act
 in cases of emergency and of great danger, as well as in
 other cases; their measures are precautionary measures
 only; if they make a mistake, it can soon be corrected:
 see s. 79."

By s. 23 any two commissioners may visit a pauper lunatic,
 call in a doctor, and, subject to his making a certificate, make
 a reception order. Are they judges performing a judicial
 act? And if not, how does their position differ from that
 of a justice acting under s. 16? By s. 20 a constable or
 relieving officer, if satisfied that it is necessary for the public
 safety or the welfare of an alleged lunatic that he should
 be placed under care and control, may remove him to the
 workhouse. It can hardly be contended that in so acting
 the constable or relieving officer is entitled to judicial
 immunity; though, if he acts in good faith, he has been held
 to be protected: *Harward v. Hackney Union*. (2) The insistence

(1) 15 Q. B. D. 149.

(2) 14 Times L. R. 306.

on the necessity of good faith in itself negatives the notion of judicial immunity, the feature of which is that a judicial act cannot be impugned, though done with malice. The truth appears to be that these summary orders, whether made by a justice, the commissioners, a constable, or a relative are made under administrative powers granted for the protection of the public and the welfare of the lunatic. It is only because the power in certain cases is given to a justice of the peace that the easy suggestion arises that, being a justice, he is acting judicially. The distinction well marked in the Act between the proceedings of a "judicial authority," on the one hand, and a justice of the peace acting under these sections, who is not a "judicial authority," points the difference. Justices of the peace are in other spheres entitled to exercise administrative functions; but in doing so are not entitled to judicial immunity. The rule as to judicial immunity was last authoritatively stated in the Court of Appeal in *Anderson v. Gorrie*. (1) "The question arises whether there can be an action against a judge of a Court of record for doing something within his jurisdiction, but doing it maliciously and contrary to good faith. By the common law of England it is the law that no such action will lie. The ground alleged from the earliest times as that on which this rule rests is that if such an action would lie the judges would lose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice;" per Lord Esher. (2) The rule therefore applies even though the judge has been guilty of a gross dereliction of duty; and, valuable as the rule is for the protection of judicial independence, it seems to me important that so striking an immunity from the consequences of wicked and wrongful acts causing serious damage should be kept within well-ascertained bounds and not be allowed to stray. As formulated in the case cited and in the authorities which the decision follows, the immunity is limited to the judicial acts of judges of a Court of record. It has been extended in recent times to judges of other

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(1) [1895] 1 Q. B. 668.

(2) Ibid. 670.

C. A. Courts, and notably to justices of the peace sitting in a
 1920 judicial capacity; but, so far as I am aware, only in respect
 EVERETT of words spoken. I venture to think that the immunity
 v. for defamatory words and the immunity for acts done may
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 Atkin L.J. express that opinion by the distinction drawn by the House
 of Lords in the recent case of *Fraser v. Balfour*.⁽¹⁾ But
 the grounds of the immunity for the spoken word have in
 some of the cases been stated in the terms of the high
 doctrine of judicial immunity: see per Channell J. in
Bottomley v. Brougham ⁽²⁾ (an alleged libel by an official
 receiver); and if I had come to the conclusion that the
 justice of the peace was acting judicially, I should have felt
 constrained to hold upon authority that binds me that a
 justice of the peace who maliciously for purposes of revenge
 or private gain, and without reasonable cause, orders a man
 to be confined as a lunatic is not civilly liable to the
 person so imprisoned. I think that this is the effect of *Hodson*
v. Pare ⁽³⁾, where it was held that a person who presents
 a petition to the judicial authority under s. 4 of the
 Lunacy Act, 1890, is absolutely immune from liability for
 libel in respect of the petition. It is noteworthy that the
 learned judges lay stress upon the points which I have
 pointed out as constituting the difference between the pro-
 cedure before the judicial authority and the procedure in
 respect of summary orders.

Much light is thrown upon this question by the decision
 of the Court of Appeal in *Royal Aquarium Society v.*
Parkinson ⁽⁴⁾, where it was held that the members of the
 London County Council sitting at a meeting for granting
 music and dancing licences under 25 Geo. 2, c. 36, s. 2—
 functions transferred to the London County Council from
 quarter sessions—were not entitled to judicial immunity
 for words spoken. The whole question of judicial immunity
 was fully argued by counsel of the greatest eminence. There
 are two passages in the judgments of the Court of Appeal

(1) (1918) 34 Times L. R. 502.

(2) [1908] 1 K. B. 584.

(3) [1899] 1 Q. B. 455.

(4) [1892] 1 Q. B. 431.

which bear closely upon this case. Lord Esher says (1): "It was argued, in the first place, on behalf of the defendant, that he was exercising a judicial function when he spoke the words complained of, and therefore was entitled to absolute immunity in respect of anything he said. It is true that, in respect of statements made in the course of proceedings before a Court of justice, whether by judge, or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of Courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorized inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes. In the case of *Dawkins v. Lord Rokeby* (2) the doctrine was extended to a military Court of inquiry. It was so extended on the ground that the case was one of an authorized inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a Court of justice acts in respect of an inquiry before it. This doctrine has never been extended further than to Courts of justice and tribunals acting in a manner similar to that in which such Courts act. Then can it be said that a meeting of the county council, when engaged in considering applications for licences for music and dancing, is such a tribunal? It is difficult to say who are to be considered as judges acting judicially in such a case. The manner in which the business of such a meeting is conducted does not appear to present any analogy to a judicial inquiry. Again, there is another consideration. It is argued for the plaintiffs that this function of granting licences, which has been transferred from the justices to the county council, is not judicial, but merely administrative. The justices had two distinct and separate duties. They had judicial duties. They had to try criminal cases, and in respect of that duty they would be entitled to the absolute immunity which I have mentioned. They had also adminis-

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(1) [1892] 1 Q. B. 431, 442.

(2) L. R. 8 Q. B. 255; L. R. 7 H. L. 744.

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trative duties, one of which was this duty of granting licences, and for the purpose of performing these they held consultations among themselves. In the case of duties properly administrative, such as that of granting licences, their action was consultative, for the purpose of administration, and not judicial. When such duties are transferred to the county council, what they do in respect of them is likewise consultative for the purpose of performing an administrative duty; it is not judicial. That consideration also appears to me to show clearly that the case does not come within the doctrine of absolute immunity applicable to tribunals similar to Courts of justice." And Fry L.J. says (1): "It was said that the existence of this immunity is based on considerations of public policy, and that, as a matter of public policy, wherever a body has to decide questions, and in so doing has to act judicially, it must be held that there is a judicial proceeding to which this immunity ought to attach. It seems to me that the sense in which the word 'judicial' is used in that argument is this: it is used as meaning that the proceedings are such as ought to be conducted with the fairness and impartiality which characterize proceedings in Courts of justice, and are proper to the functions of a judge, not that the members of the supposed body are members of a Court. Consider to what lengths the doctrine would extend, if this immunity were applied to every body which is bound to decide judicially in the sense of deciding fairly and impartially. It would apply to assessment committees, boards of guardians, to the Inns of Court when considering the conduct of one of their members, to the General Medical Council when considering questions affecting the position of a medical man, and to all arbitrators. Is it necessary, on grounds of public policy, that the doctrine of immunity should be carried as far as this? I say not. I say that there is ample protection afforded in such cases by the ordinary law of privilege."

It cannot make any difference in this question whether the administrative duty is intrusted to one person or to

(1) [1892] 1 Q. B. 447.

several, to a justice of the peace or to the justices in quarter sessions. I come to the conclusion that the justice of the peace acting under s. 16 of the Lunacy Act, 1890, is acting as an administrator, and not as a judge; if this is true in the case of a summary reception order made under s. 16 by a justice of the peace, it becomes unnecessary to consider the special position of a similar order made by a chairman of a board of guardians authorized in that behalf under s. 25 of the Lunacy Act, 1891. The section is oddly drawn; it only purports to deal with the effect of an order signed by the chairman; it does not expressly deal with the rights or obligations given to or imposed upon the chairman; but presumably they would be such as were reasonably necessary (but no more) for the purpose of making orders for the reception of pauper lunatics in institutions for lunatics. Whether the chairman has the power under s. 21 of the Act of 1890 to order temporary detention in a workhouse (which does not appear from the language of the Act to be an "institution for lunatics") may be doubted; as one may doubt whether the chairman may order an alleged lunatic to be brought before him under s. 14, sub-s. 3, or by order require a constable to apprehend a lunatic wandering at large and bring him before the chairman. I do not see that any coercive powers other than that of making the reception order are given at all. But the fact that the power of making the reception order is given in these vague terms to a person who by reason of his office is an administrator pure and simple, and who is to exercise the power without the sanction of any judicial oath, appears to me to emphasize the point that the duties of determining whether a reception order shall be made are administrative and no more.

I have put in the forefront of this judgment the claim for complete immunity in respect of a reception order, because if it were established it would be unnecessary to consider in any other aspect the rights of the plaintiff against the defendant Griffiths. Having come to the conclusion that judicial immunity does not exist, one is now free to consider

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It will be convenient in the first place to refer to the statutory protection given by s. 330 : [The Lord Justice read sub-s. 1.] This section is pleaded by both defendants. It obviously cannot avail them on this appeal as the jury have not agreed upon the issue of reasonable care. It was relied on by the plaintiff as imposing a statutory obligation upon persons putting the Lunacy Acts in force to act in good faith and with reasonable care. I agree with the view expressed by the Lord Chief Justice that the section has not this effect. It is a shield for defendants, not a weapon for plaintiffs. It is a protection against a liability which would exist had the section not been enacted. At the same time I think that the section has to be taken into consideration when one comes to determine the next question, which is whether the defendants have infringed any and what rights of the plaintiff.

I propose in the first place to consider whether the plaintiff is entitled to sue the defendants or either of them for negligence. The only issue for us to determine is whether the defendants owed any duty to the plaintiff to act with care. If they did, the issue whether they committed a breach of that duty has yet to be decided by the judges of fact, the jury. One may begin by pointing out that the issue of negligence is distinct from the issue of the validity of the reception order and the detention under it. The certificate of an auditor, the act of a solicitor in entering an appearance or compromising a suit, the exercise of authority by an agent may all be valid so as to produce the full legal effects of such acts, and yet in spite of and indeed by reason of their validity confer a cause of action if negligently done. This appears to have been one of the points of difference in *Reg. v. Whitfield* (1), between the majority of the Court of Appeal and Lord Coleridge C.J. There the question arose upon a rule for a certiorari to quash a reception order. The only question was as to the validity of the order. One ground

(1) 15 Q. B. D. 122.

taken by Lord Coleridge was that, as the statute made an examination of a lunatic a condition precedent to the validity of the order, a negligent examination was no examination. (1) Sir James Hannen and Lindley L.J. took the view that, as there was an examination, it was for the justices to determine the extent of the examination, and that on that ground there was no lack of jurisdiction. Here we are dealing for this part of the case with an admittedly valid order, and have only to consider whether it was made with reasonable care, and, if not, whether that was a breach of duty owed to the plaintiff.

In determining whether one man owes a duty to another to take care, it is essential to consider the mutual relations of the parties in each particular case. In the case of the Lunacy Act the provisions of the statute are directed as much to promoting the welfare of the alleged lunatic as the protection of the public. In s. 11, providing for emergency orders signed by a relative, the welfare of the lunatic is expressly set out as necessary for consideration. The omission of express references in other sections cannot exclude its consideration by those who take action under the statute. The whole history of the legislation in respect of lunatics and lunatic asylums turns upon the abuses to which lunatics were exposed up to the beginning of the nineteenth century, and the humane endeavours of the Legislature to mitigate those abuses. The elaborate provisions of the Act have the twofold object of securing beneficial treatment for the lunatic, and of providing checks against the improper confinement of those who are not lunatics. The ultimate object of the inquiry set on foot by petition, or complaint, or notice is to secure the confinement of the alleged lunatic. Grievous as is the wrong of unjust imprisonment of an alleged criminal, I apprehend that its colours pale beside the catastrophe of unjust imprisonment on an unfounded finding of insanity. Modern organization has no doubt done much to remove the horrors that were associated with Bedlam in the days when the victims were subject to public exhibition.

(1) 15 Q. B. D. 137.

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Probably even now the insane ward or reception ward is not without its revolting incidents. But it is the effect on the mind sane, even if feeble, that knows itself wrongly adjudged unsound that produces the most poignant suffering. That the Legislature has sought to provide every reasonable check to prevent such suffering is clear; that those who are intrusted with or undertake the exercise of the powers given by the Legislature owe a duty to the individual in respect of whom they are exercising those powers to take reasonable care to refrain from inflicting such suffering appears to me to be equally clear. Moreover, the existence of such a duty appears to me to be recognized by s. 330 to which I have already referred. The protection is given to everyone doing anything in pursuance of the Act, whether with or without jurisdiction, if he acts in good faith and with reasonable care. He cannot act without jurisdiction in good faith unless he believes that he is acting with jurisdiction. The statute obviously assumes that persons believing that they are acting within their jurisdiction will consider themselves bound to exercise reasonable care. It would not impose as a condition of protection a standard of conduct which was not normally to be expected in the performance of the acts protected. Once find the duty to take care, when the duty is owed in the performance of acts which have special relation to the welfare of an individual, and if performed carelessly may result in the wrongful deprivation of liberty and grievous mental distress, I can see no difficulty in the conclusion that the duty is owed to the individual.

Obviously though general principles lead to the conclusion of a duty to take care, the particular provisions of the statute may limit the obligations which would otherwise be imposed. For example, s. 35 makes an order which appears to be in conformity with the Act sufficient authority for conveying the alleged lunatic to the place of detention, and for detaining him there; and there may be similar provisions. Whether the duties of the person making the reception order or signing a medical certificate are limited by the statute I shall subsequently discuss. Meantime I proceed on the assumption

that they are not. The reasons which I have given bring me to the conclusion that a duty to take reasonable care is owed to the alleged lunatic both by the person making the reception order and by the medical practitioner who gives the medical certificate, which is the condition precedent to a reception order being made.

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But the case of the medical practitioner is subject to special considerations. I apprehend that, if a man undertakes the treatment of another whom I will call a patient which is likely to cause pain or suffering to the patient unless performed with special skill or care, he is liable to the patient if he causes pain or suffering by the omission to use a reasonable degree of such skill or care. This obligation is not based on contract or implied contract between the patient and the doctor. It would apply to a doctor treating a member of the household of the other party to the contract, as it would, in my judgment, apply to a doctor acting gratuitously in a public institution, or in the case of emergency in a street accident; and its existence is independent of the volition of the patient, for it would apply though the patient were unconscious or incapable of exercising a conscious volition. The duty is not limited to acts of physical manipulation: it extends to advice. Moreover, it appears to me to extend *prima facie* to reports made in respect of the medical condition of a person with a view to determining his future medical treatment by others. In all the above cases the duty to the patient may be negatived by contract express or implied, or by some circumstances that are inconsistent with the existence of such a duty. A patient may be examined, for instance, by the medical officer of an insurance company; it would, I think, be reasonably plain that the patient submitted himself to examination upon the footing that the doctor owed the duty to take care, not to him, but to the insurance company. But in the absence of circumstances negativing the duty I think that it exists. I conceive that every reason for its existence is to be found in the case of a doctor certifying a man a lunatic for the purpose of his detention as such. In *In re Shuttle-*

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worth (1) a writ of habeas corpus had been issued to test the validity of the detention of a woman as a lunatic. The suggested invalidity was by reason of the inadequacy of the medical certificates. The Court took the view that the degree of detail to be given in the certificate was a matter for the doctor's discretion. "The Act refers this," says Lord Denman (2), "to the skill and knowledge of professional persons. . . . Credit is given to him as a skilful person by the Act of Parliament." A matter involving medical skill is intrusted to a doctor who has to examine the alleged lunatic (see the form of certificate), who knows that he is examining him with the object of determining whether he is to be confined in a lunatic asylum, and whose certificate is a condition precedent to such confinement. I think that he owes to the alleged lunatic a duty to take care. This view is not without weighty authority. In *Hall v. Semple* (3) we have the advantage of the views of Crompton J. on the point. It is true that the point was determined in the course of a summing-up to a jury in a trial at nisi prius; but the case was tried at Westminster; the trial took several days; and I think that the very learned judge's direction is the result of his considered judgment. He says this (4): "The true ground of his complaint is the negligence of the defendant and the want of due care in the discharge of the duty thrown upon him; and I think that if a person assumes the duty of a medical man under this statute and signs a certificate of insanity which is untrue, without making the proper examination or inquiries which the circumstances of the case would require from a medical man using proper care and skill in such a matter—if he states that which is untrue, and damage ensues to the party thereby, he is liable to an action, and it is to that I desire to direct your particular attention. Take me, then, as telling you, in point of law, that if a medical man assumes under this statute the duty of signing such a certificate, without making, and by reason of his not making, a due and proper examination, and such inquiries as are

(1) 9 Q. B. 651.

(2) *Ibid.* 661.

(3) 3 F. & F. 337.

(4) *Ibid.* 354.

necessary, and which a medical man under such circumstances ought to make and is called on to make, not in the exercise of the extremest possible care, but in the exercise of ordinary care, so that he is guilty of culpable negligence, and damage ensue ; then that an action will lie, although there has been no spiteful or improper motive, and though the certificate is not false to his knowledge. I repeat that (apart from the special point raised upon the statute), if a person assumes to sign such a certificate and does so untruly, without making proper examination or inquiries, that is, such as the circumstances of the case would require from a medical practitioner, and which ought to be made by him, then, if damage ensues, he is liable to an action for such damage. Of course, as I shall explain afterwards, that would not apply to a mere error in judgment. It is not that a medical man is bound to form a right judgment, so as to be liable to action if he does not. There are cases of insanity which are very difficult to deal with or to understand. But what he is required to do is to make an examination ; and, if it be necessary, to make further inquiries, and not to act without such inquiries as may be required. It would be dreadful if a man were to be visited, in cases of this kind, for consequences arising from mere error in judgment or mistake in fact. There must, to make him liable, be negligence of the nature I have described ; negligence in the discharge of those proper duties which it must be taken he has assumed in undertaking to sign the certificate of insanity ; and if you are satisfied that there has been negligence with reference to these matters—culpable negligence as I have described it—then he is liable.”

It is said that a contrary view has been expressed by the Court of Appeal in *Thompson v. Schmidt*. (1) There the plaintiff had been detained in the workhouse by the relieving officer under s. 20. That section provides that a constable or relieving officer, if satisfied that it is necessary for the public safety or welfare of an alleged lunatic that the alleged lunatic should, pending proceedings, be placed under care

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(1) 56 J. P. 212.

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and control, may remove him to the workhouse. The section is a provision for urgent cases, and does not prescribe, and obviously does not require necessarily, any inquiry by the constable or relieving officer. The relieving officer, however, upon receiving a complaint from the plaintiff's family, declined to act without some evidence, and the defendant, who had been the plaintiff's medical attendant, gave the relieving officer a certificate that he was of opinion that the plaintiff was a lunatic. For this certificate he was sued for negligence. The Court of Appeal were of opinion that he was not liable for two reasons: 1. That his act did not cause the imprisonment; 2. That he owed no duty to the plaintiff. The case seems to me plainly distinguishable from the present. The defendant was not in any way acting in pursuance of the Lunacy Act. He was expressing an opinion to satisfy the relieving officer's mind, upon whom alone rested the responsibility for action. He was in no different position than if he had been a neighbour to whom the relieving officer had addressed an inquiry as to the man's sanity. The case seems to be precisely one of those that I suggested above, where the circumstances plainly negative a duty to the plaintiff. It has moreover to be remembered in this case that the defendant Anklesaria was the medical officer of the workhouse, and that the plaintiff was at the time of the certificate, and had been for three days before, an inmate of the workhouse, and under the medical charge of the defendant, who had in fact subjected him to a complete medical examination, and had had several conversations with him with a view to ascertaining his mental condition. Quite apart from general considerations, it appears to me that there was in this case the special relation of doctor and patient between this defendant and the plaintiff, which establishes a duty owed to the plaintiff to take reasonable care in certifying him. I think, moreover, that the duty is not merely a duty to take reasonable care in making inquiries, that is, in ascertaining the necessary data, but includes a duty to exercise reasonable professional skill in forming a conclusion from such data. For what other purpose

is a certificate from a medical practitioner required at all? As Lord Denman says (1), credit is given to the doctor as a skilful person; and the expectation of the exercise of reasonable professional skill is the essential check provided by the Legislature. A medical man is not bound to come when called in under s. 16, but if he does come, to use a phrase recently applied by the Lord Chancellor in a different connection, he comes "spondens peritiam artis." The duty to take care, which is of the essence of a cause of action for negligence, includes various kinds and degrees of care; and in the case of professional men includes the duty to exercise reasonable skill.

It is said, however, that the terms of the statute indicate that the duty to take care is negatived in the case of the justice or chairman making the reception order. All that is required, it is said, is that the justice should be satisfied that the alleged lunatic is a lunatic and is a proper person to be detained. If he is satisfied, it matters not what elementary precautions he has omitted, or however plainly defective the evidence may be, whether medical or otherwise; no duty is imposed upon him save to be satisfied. It is true that it is further admitted that he must be honestly satisfied, which means that he must be acting in good faith; but I find difficulty in appreciating what difference this makes; for how can he be satisfied at all if he is satisfied "dishonestly" or "in bad faith"? We are not dealing here with the validity of the order. If it could be shown that the justice making the order never was satisfied, possibly the order would be invalid, though under s. 35 it would authorize detention. But the question we are now considering is whether, assuming that the satisfaction of the justice validates the order, he ought to take reasonable care before becoming satisfied; and I see nothing in the express terms of the section to outweigh the considerations derived from general principles and the terms of s. 330 that have led me to the conclusion that the duty to take reasonable care exists.

We were naturally much pressed by the decision in *Harward*

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v. *Hackney Union*. (1) That was an action brought against the guardians and Frost, the relieving officer, for false imprisonment. The relieving officer had acted under s. 20 of the Lunacy Act, 1890, and had removed the plaintiff to the workhouse for the temporary detention there specified. The defence was that the defendant was honestly satisfied that it was necessary that the plaintiff should, pending proceedings, be placed under proper care and control. For reasons already given I doubt whether the absence of reasonable care would, if proved, have invalidated the action of the relieving officer so as to make him liable to an action for false imprisonment. But the Court proceeded to say that the section did not impose upon the relieving officer the duty to take reasonable care to satisfy himself. The ground of the decision seems to be that given by Chitty L.J., who says that the relieving officer has to act on the spur of the moment. No doubt also the Court would have in its mind the fact that under the section the officer has not to form an opinion whether the alleged lunatic is in fact a lunatic, nor is the detention other than detention in a workhouse for a temporary purpose for a period of three days. The circumstances under s. 20 seem to me to be materially different from those under s. 16, and I do not feel compelled by the decisions on that section to extend the protection thrown over officials acting under it to those acting with different powers and far more serious results under s. 16.

I think, therefore, that there was a duty owed by the chairman and the doctor to the plaintiff to take reasonable care to satisfy themselves that the plaintiff was a lunatic before respectively signing a detention order or signing a certificate; and I think that the duty of the doctor extended to exercising a reasonable degree of professional skill. If therefore there was any evidence of a breach of such duty on the part of the respective defendants, the plaintiff was entitled to have the verdict of the jury on such issue, and is entitled to have the case set down for further trial. It was however contended before the Lord Chief Justice, and before

us, that in any case the negligence of the doctor, even if proved, did not cause any damage to the plaintiff, inasmuch as the real cause of the imprisonment was the independent decision of the chairman, who might, if he pleased, have ignored the certificate. It is on this ground that the Lord Chief Justice entered judgment for the defendant Anklesaria. Had the action been framed for false imprisonment only, I could have appreciated the ground of the decision on the principle of cases where the prosecutor has been held not to be liable for imprisonment ordered by the judicial decision of the Court. But when the action is for negligence, different considerations apply. I imagine that in a claim for damages in respect of a libel addressed to a plaintiff's employer accusing the plaintiff of dishonesty, whereby the plaintiff was dismissed, it would be no answer to rely upon the employer's "independent volition," even though the defendant desired to leave the matter for the employer's consideration, and did not intend the plaintiff's dismissal. The dismissal would be the natural and direct result of the wrong. So here the certificate is given in the terms that the doctor is of opinion that the plaintiff is of unsound mind, in an inquiry which is to determine whether the plaintiff shall be confined or not, the defendant well knowing, as the fact is, that his certificate is a condition precedent to such detention. I cannot doubt that, if the certificate is wrongfully given, the damages for detention may be the natural and direct result of the wrong. The issue is one of fact for the jury.

It only remains to consider whether there was any evidence of want of care on the part of the chairman or of the doctor. I think that there was on the part of both. In ordinary course, having come to that conclusion, if the case were going back for a new trial, I should refrain from going into detail upon this matter, but, as we are not agreed, I ought to state some grounds for my opinion. The plaintiff's evidence consisted of his own testimony and the evidence of several witnesses, medical and other. He stated that he himself had always been sane, though he admitted he had held eccentric opinions. In cross-examination he admitted acts, especially

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in the year 1916, when he was detained temporarily at the workhouse, which I think of themselves unexplained, if put before the defendants at the time of making the reception order, afforded some evidence which the defendants might ask a jury to say negatived the absence of reasonable care. But the strength of the plaintiff's evidence, I think, lay in his own appearance and demeanour as presented to the jury, coupled with affirmative evidence he produced from which the jury might believe, if they chose, that he was substantially the same at the material date, March 24, 1919. The plaintiff argued his case in person before us with great force, complete self-possession, and much lucidity. He appeared to appreciate the legal points, and cited a number of cases to us, distinguishing those that might be contended to be against him, and emphasizing those in his favour. I do not say that all his points were made with equal judgment; but, taking his performance as a whole, it impressed me as one of the most remarkable efforts of a litigant in person that I have ever witnessed. I gather from the shorthand notes of the evidence, and from a reference in the summing up of the Lord Chief Justice, that he conducted himself similarly before the jury. If so, one cannot wonder that the defendants' counsel did not contend that the plaintiff was then insane, or that Dr. Connolly of Colney Hatch asylum admitted that he was not. But the plaintiff called witnesses who spoke to his conduct and demeanour before and after the inquiry, persons of education and judgment who had seen him in the week in which he was taken to the workhouse; and one, a lady, a qualified medical practitioner, with some experience in mental diseases, who had seen him and conversed with him the day before he was taken to the infirmary, and saw him four days after his escape; and a lady to whose house he escaped. None of these persons had any doubt as to the sanity of the plaintiff at these material times; and it appears to me that there was ample evidence that, if the defendants had considered the plaintiff's case with any reasonable care, they would at least have formed the opinion, after seeing

him, that a mistake might have been made, and would have either pursued further inquiries themselves, or certainly have given the plaintiff the opportunity of putting before them the evidence which he had available. The plaintiff read to the jury what appears to me a very material statement as to what took place before the chairman, important both as to what was said and as to what was not said. For greater certainty he read it from a memorandum which he stated had been made about the material time, I think after his escape from the asylum. The story so told was not consistent with the evidence of the defendants; but it was plainly open to the jury to believe the plaintiff rather than the defendants. It not only indicates a completely logical sane sequence of answers by the plaintiff, but indicates that neither the chairman nor the doctor addressed any inquiry to the plaintiff as to the points which were stated both before the jury and before us to be some of the most important grounds for believing the plaintiff to be insane—namely, the suggested unprovoked attacks upon his mother, want of control at night, and insane delusions as to the wealth of his father, and the condition of his own health. Indeed of all the facts relied upon by the doctor as indicating insanity, whether primary or communicated, the only one fairly put to the plaintiff appears to me to be the question of striking his father, as to which he said he did it in self-defence. Nor was the plaintiff cross-examined at the trial to suggest that any particular inquiries other than those so detailed by him had been put to him by either defendant. No doubt the defendants gave evidence as to the inquiry which did not correspond with the plaintiff's evidence; but the conflict of testimony was for the jury; and in weighing the evidence it seems to me that the jury were entitled to take into account that in this particular case the material witnesses and persons concerned were all connected with the workhouse—chairman of guardians, medical officer of the infirmary, relieving officer, nurse and attendant at the observation ward. In regard to the evidence of want of skill on the part of the doctor, the plaintiff adduced the

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evidence of a very distinguished mental specialist that the facts stated in the medical certificate disclosed no adequate ground on which to justify certification. A jury would properly be warned that a mere difference of opinion between medical men would not necessarily prove negligence on the part of one of them ; but it seems to me impossible to suppose that after the evidence of Dr. Risien Russell, however qualified in cross-examination, there was no evidence fit to be put before the jury. To my mind there was evidence in the certificate alone. The statute, s. 28, requires that every medical certificate shall state the facts upon which the medical practitioner has formed his opinion, which must mean all the facts. The doctor at the trial said that he relied also upon grandiose notions expressed by the plaintiff in conversations in the observation ward, upon heredity, and upon lack of control at night, none of which are recorded in the certificate. I do not desire to express any opinion as to what the true facts are ; but I think that the jury were not obliged to accept all the evidence of the defendants and their witnesses, and that there was some evidence upon which the plaintiff might ask the jury to believe that the certificate upon which he was confined recorded what Lord Coleridge in *Reg. v. Whitfield* (1) deprecated as "the flimsy stuff on which perfectly sane men are sometimes incarcerated in lunatic asylums."

I have come to the conclusion, therefore, that the judgment for the defendants should be set aside, and that a new trial should be ordered. We were pressed very much by counsel for the defendants by the injury which public interests would suffer if there was an enforceable obligation upon persons acting under the Lunacy Acts to act with reasonable care. It was said that henceforward it would become impossible to induce persons to act. I am not much impressed by the argument. I doubt whether any person, taking upon himself the painful responsibilities imposed by the Lunacy Acts, was ever encouraged to act by the consideration that he could be negligent with impunity, or will be deterred from

acting by the consideration that if he is negligent he will have to pay damages. It is not by such motives that public or professional men in this country are swayed. On the other hand we are dealing with the liberty of persons ill able to protect themselves, paupers, and persons of weak mind who, though sane, may afford to the unthinking or careless mind evidences of insanity. In my opinion it is just as it is convenient that the law should impose a duty to take reasonable care that such persons, if sane, shall not suffer the unspeakable torment of having their sanity condemned and their liberty restricted; and I am glad to record my own opinion, ineffectual though it be, that for such an injury the English law provides a remedy.

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Appeal dismissed.

Solicitor for plaintiff: *A. R. Lord.*

Solicitors for defendants: *Samuel Price & Sons.*

W. F. B.

In re AN ARBITRATION BETWEEN THE MERSEY DOCKS
 AND HARBOUR BOARD AND THE LORDS
 COMMISSIONERS OF THE ADMIRALTY.

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War—Shipping—Hopper Barge—Requisition—Compensation—Measure of Damage—Increased Cost of New Barge—Loss of Services of Barge—Remoteness.

Under a contract made in December, 1914, between a dock board and a firm of shipbuilders, the latter were to build for the former a hopper barge of special construction. In February, 1917, when the barge was nearing completion, the Admiralty requisitioned her, altering her construction for purposes of their own, and in August of the same year they purchased her for the original contract price to be paid by them to the shipbuilders. If the barge had not been requisitioned, she would have been completed and delivered to the Board in April, 1917. Owing to difficulties arising from the war it was impossible for the Board to replace the barge by another of like construction in less than three years from the last-mentioned date, or at a cost less than three times the contract price of the original barge. In proceedings to determine

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the amount of the compensation which ought, in these circumstances, to be paid by the Admiralty to the Board :—

Held, first, that the Board were entitled to recover the amount of the difference between the contract price of the original barge and the increased cost to them of replacing her ; but, secondly, that the Board were not entitled to any compensation for the loss of the services of the barge during the above-mentioned period of three years, the damage thereby caused being too remote.

SPECIAL CASE stated by an arbitrator.

The Mersey Docks and Harbour Board (hereinafter called “the Board”) was a public body incorporated by statute for the purpose (*inter alia*) of maintaining and improving the channels, dock entrances, docks, and other conveniences of the Port of Liverpool. The Board had power to levy rates and duties and to borrow money for these purposes with, as the arbitrator held, the corresponding duty to take all steps reasonably necessary to keep these channels, dock entrances, docks, and conveniences in a proper state. For the due performance of that duty it was necessary for the Board to have a fleet of dredgers and hopper barges.

By a contract dated December 4, 1914, and made between the Board and Messrs. Lobnitz & Co., Ltd., shipbuilders, the latter were to build for the former a barge known as No. 798 to be built according to certain plans and a specification, and to be delivered on or before October 1, 1915, the builders agreeing to pay as liquidated damages 100*l.* per week for such time as the barge should remain undelivered after that date. The price of the completed barge was to be 22,750*l.*, and there was no provision for increase or decrease of price in the case of any alteration in the cost of material or wages. The barge was to be of an unusual design and construction having special reference to the port and to the delivery gear of the dredger with which it was intended that she should work. It was provided that the barge was to be the property of the Board at all stages of her construction.

In consequence of work for the Admiralty necessitated by the war the builders were unable to complete the barge by the stipulated date, but the Board agreed to an indefinite extension of the time on condition that the builders made every effort

to complete the barge as soon as possible. In August, 1915, with a view to advance the work, the Board had obtained from the Government a certificate that the construction of the barge was work of national importance, and in February, 1916, they obtained from the director of the Priority Section of the Admiralty a declaration that their contract with Messrs. Lobnitz was to be considered as munitions work.

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On February 8, 1917, when the barge was approaching completion, the Admiralty purported to requisition her in her unfinished state for Admiralty service. They instructed the builders to make certain alterations such as to deprive the barge of the essential character of a hopper barge.

Shortly after the requisition and after the alterations had been commenced the Admiralty informed the Board that they did not intend to acquire the property in the barge but proposed to hire her for an uncertain time. The Board objected to the requisition; they claimed that if it was to stand the vessel must be considered as entirely appropriated by the Admiralty having regard to the alterations which had been or were being made, and that the Board had no longer any interest in her save a claim for compensation; and they objected to the proposal to hire the barge. The Admiralty insisted upon their requisition, and completed the adaptation of the barge for their requirements, converting her into a vessel to carry and work hydroplanes, or to serve some similar purpose.

On August 7, 1917, the Admiralty by letter for the first time informed the Board that they proposed to purchase the barge from the builders.

By an agreement of reference dated March 1, 1919, between the Board and the Commissioners of the Admiralty, the parties referred to a named arbitrator the determination of the amount of compensation to be paid by the Admiralty to the Board in respect of the acquisition of the barge by the Admiralty. The agreement contained the clause: "The Admiralty to settle direct with Messrs. Lobnitz for the hopper which they have completed to their special requirements."

On October 23, 1919, the arbitration took place. The

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1920 below. The arbitrator reserved his decision.

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Subsequently the arbitrator stated his award in the form of a Special Case which set out the facts above stated and was further substantially as follows :—

“ 5. In February, 1917, the barge was approaching completion, and I find that if it had not been for the occurrence in the next paragraph mentioned [namely, the requisitioning of the barge by the Admiralty, which was mentioned in para. 6 of the Case] she would have been completed in the course of April, 1917. . . . ”

“ 7. The unfinished barge was not a British ‘ ship ’ or ‘ vessel ’ as defined in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742, and subject to the opinion of the Court I hold that the requisition and alteration of the barge was not authorized by His Majesty’s Proclamation of August 3, 1914, or by any Order in Council under the Defence of the Realm Acts, or any other Act. The contention of the Admiralty before me was that the barge was lawfully requisitioned and altered by virtue of the general prerogative of the Crown acting for the preservation and defence of national interests.”

“ 10. I find the following facts : (i.) That when the alterations ordered by the Admiralty were completed the barge was no longer a hopper barge and in her converted state would have been useless to the Board. She could not without difficulty have been reconverted into a hopper barge. (ii.) The barge has remained in the possession of the Admiralty up to the present time. There was no evidence as to the arrangement, if any, made by the Admiralty with the builders, but the Agreement of Reference contains the clause : ‘ The Admiralty to settle direct with Messrs. Lobnitz for the hopper. . . . ’ (iii.) The Admiralty when they made their requisition and also in August, 1917, knew that for a long period it would be impossible for the Board to replace the barge by building another. (iv.) Owing to the war it was impossible for the Board to replace the barge either by purchase

or by building within a less period than three years from the date of requisition. No suitable vessel could have been purchased at any time. It was admitted that no 'priority order' could have been obtained before the early part of 1919, and therefore no contract for construction could have been placed before that time, and a similar barge could not have been constructed in less than twelve months from the date of contract. (v.) Between the date of the requisition and the earliest date at which a contract for a similar barge could have been placed, prices of materials and labour rose enormously, and for that reason the barge could not have been replaced at a less cost than about 70,000*l*. If a priority order could have been obtained and a contract placed at or shortly after the date of the requisition the cost would have been less. (vi.) The condition of the Port of Liverpool at the date of the requisition and at all material times afterwards was such that it was the duty of the Board to replace the barge as soon as possible, and accordingly at the earliest possible date, namely, in February, 1919, the Board obtained estimates for that purpose. The lowest estimate was that of the original builders, who offered to duplicate No. 798 for 63,000*l*. with a provision for increase or decrease in the event of increase or decrease in the cost of materials or labour during the construction. The Board reasonably and properly accepted the builders' offer, and on May 7, 1919, a formal contract to replace the barge as per the original specification and plans upon the terms of the offer was entered into. Wages have risen during the construction under this contract, and for the purposes of this case, it may be taken that the amount which the Board will have to pay the builders will not be less than 70,000*l*. I further find that the barge cannot be completed before the spring of 1920.

" 11. In these circumstances the Board claimed from the Admiralty the difference between 22,750*l*., the contract price of No. 798 and the price they will have to pay for the barge now being built to replace her, and they further claimed 28,770*l*. for the loss of service of the barge for the three years which will have elapsed between the date when the barge

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C. A. No. 798 would have been completed and available if she had
1920 not been taken by the Admiralty and the date when she
will be replaced by the barge now building.

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In re. “ 12. The Admiralty did not dispute that the Board were
entitled to compensation for the loss by the action of the
Admiralty of the benefit of the contract of December, 1914,
but they contended that the principle on which damages
are assessed for tortious acts or breaches of contract had no
application to acts of the Crown in the exercise of its duty
to provide for the national defence, and that neither the
cost of replacement nor the delay involved in replacing should
be taken into account in the circumstances. Counsel sub-
mitted that the measure of compensation should be the
difference between the contract price and the value of the
vessel when taken.

“ 13. As regards this contention I find the following facts :
Owing to the special design of barge No. 798 there was no market
for her or for similar vessels. Her value to the Board consisted
of the services she was capable of rendering in the Port of
Liverpool and except for the purpose of these services it would
not have been worth while to build her, or for any one to buy
her, or to take over the contract for her with a view to continue
her character. She had an emergency value to the Admiralty
for the purpose of conversion into war plant, but the
Admiralty did not furnish me with any evidence or estimate
of that value. They furnished an estimate of her value based
upon the value of a barge steamer of the same tonnage,
which estimate appeared to me fallacious.

“ 14. Inasmuch as the Board were bound to replace this
vessel I think she was worth to them whatever it would
cost them to replace her, limited possibly to the value to the
port of the work she would be capable of doing during her
life, and I find that the Board would not willingly have parted
with this contract for a less sum than that for which they could
have procured the building of a similar vessel. I am unable
to find any other reasonable criteria of value for such a vessel.
The cost to the builders of the material and labour which
they had put into her does not appear to me such a criterion,

having regard to the rise in prices since she was laid down ; but, if this figure is in any way important, I estimate it at 26,000*l.* or thereabouts on February 8, 1917.

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“ 15. The increase in cost involved in the replacement was due to the general rise in wages and cost of material which occurred between the early part of 1917 and 1919. So far, if at all, as that rise was occasioned by the war it was only indirectly so occasioned ; but the war was the direct cause of the work of replacement being delayed until that rise had occurred.

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“ 16. As regards the claim for loss of services of the barge for the three years preceding her replacement, the delay in replacement was a consequence of the war, and was of the nature of a loss and inconvenience caused to the whole community by the war, but the Board would not have suffered this loss and inconvenience from the war if the Admiralty had not taken possession of the barge. No suitable hopper could have been bought or hired by the Board during that period. There was accumulation and consolidation of silt, caused by the Board being short of a hopper for three years, which will be difficult and costly to deal with, and the work will have to be done at a time when wages and expenses have risen much beyond the rates of 1917. It appeared, however, in evidence that the Board's claim of 28,770*l.* was arrived at by treating the expenses, such as wages, coal, and similar outgoings, of working a hopper barge for three years as an approximate measure of the value of the work she would have done in that time.

“ The questions for the opinion of the Court are : (i.) Whether the Board is entitled to recover the difference between the contract price of barge No. 798 and the cost of replacing her, regard being had to the fact that replacement was impossible at the date of the act complained of and continued impossible for several years ? (ii.) If not so entitled, how should the compensation be assessed ? (iii.) Is the Board further entitled to compensation for the loss of the services of the hopper during the three years mentioned, and upon what principle should the compensation, if any, be assessed ?

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1920 with the principles which may be laid down by the Court."

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Greaves Lord K.C. for the Mersey Docks and Harbour Board. Questions 1 and 3 should both be answered in the affirmative.

First, the Board is entitled to recover from the Admiralty the difference between the contract price of the original hopper barge and the much larger sum represented by the cost of replacing her. The barge would in the ordinary course have been completed and delivered to the Board by April, 1917, at the contract price. The Admiralty however requisitioned her in February, 1917, before she was completed, and afterwards bought her, paying the price to the shipbuilders. The value of the barge to the Board consisted in her fitness for special work in the Port of Liverpool, and when she was requisitioned by the Admiralty it became necessary for the Board to find another barge equally suitable for their purposes. The Admiralty are, therefore, bound to make good to the Board the cost to which the Board will be put in replacing the barge as she was at the time when she was requisitioned by another barge of the same kind: *The Harmonides*. (1) This is in effect admitted by the Admiralty in their points of answer. Owing to the war it was impossible for the Board to obtain another barge of the required design and construction for about three years, or at a cost less than about three times the contract price of the original barge. In these circumstances the Board are entitled to recover the difference between the price of the original barge, which has been paid by the Admiralty, and the increased price which the Board now have to pay for a similar barge.

Secondly, the Board are further entitled to compensation for the loss of the services of the barge during the period of three years between the date on which, but for the action of the Admiralty, the original barge would have been delivered to the Board, and the date on which the Board could have obtained another barge. The right of the Board to compensa-

(1) [1903] P. 1.

tion for the loss of these services appears from the cases of *De Keyser's Royal Hotel v. The King* (1); *The Marpessa* (2); and *Cory v. Thames Ironworks Co.* (3) It also appears on principle and apart from authority. The Admiralty by requisitioning the barge deprived the Board of the contract under which she was to be delivered to them and of all the benefits resulting therefrom, including the right to liquidated damages from the shipbuilders in the event of their postponing delivery of the barge, and the right to the services of the barge when delivered, and the Board are entitled to compensation for the loss of these rights.

Ricketts for the Commissioners of the Admiralty. The Admiralty admit that by their action in requisitioning the barge the Board lost the benefit of their contract for the barge and are entitled to some compensation for the loss; but they do not admit that the Board are entitled to all the compensation which they claim.

First, the Board are not entitled to recover the difference between the contract price of the original barge and the present cost of replacing her. They are only entitled to the difference between the contract price of the barge and the cost of replacing her by a new contract on February 8, 1917, the date of the requisition, or at latest on August 7, 1917, the date when the Admiralty decided to purchase her. The damages which a person, whose property has been lost or destroyed by the wrongful act of another, is entitled to recover from the wrongdoer are measured with reference to the value of the property to the owner at the time of its loss: *The Harmonides* (4) and per Gorell Barnes P. in *The Marpessa* (2); and the Admiralty by requisitioning property cannot be in a worse position than a wrongdoer.

Secondly, the Board are not further entitled to compensation for the loss of the services of the barge between the date on which she would have been delivered to them under the contract and the date on which they could have replaced

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(1) [1919] 2 Ch. 197.

(3) (1868) L. R. 3 Q. B. 181.

(2) [1906] P. 14, affirmed [1906]

(4) [1903] P. 1.

P. 95, and [1907] A. C. 241.

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her by another barge. The Board could not recover from the Admiralty as compensation for requisitioning the barge a greater amount than they could have recovered from the shipowners as liquidated damages under the contract. The Board have never enforced their claim to liquidated damages against the shipbuilders and must be taken to have waived it.

The damage caused to the Board by loss of the services of the barge is too remote from the act of the Admiralty in requisitioning the barge to be the subject of compensation.

THE EARL OF READING C.J., after referring to the facts, continued: The differences which the Mersey Docks and Harbour Board and the Commissioners of the Admiralty submitted to the arbitrator regarding the compensation to be paid by the Admiralty to the Board in respect of the hopper barge requisitioned in February, 1917, and afterwards purchased by the Admiralty, have arisen as a result of the war. After the barge had been requisitioned the state of matters was such that it was impossible for the Board to replace her by another similar barge in less than about three years. Moreover, during that time the cost of labour and materials rose so greatly that the price of constructing a barge of this kind would have been approximately three times the price of the original barge as fixed by the contract of December, 1914.

The arbitrator has stated his award in the form of a Special Case, which raises several questions for the opinion of the Court concerning the principles to be applied in ascertaining the compensation.

The first of these questions is whether the Board is entitled to recover the difference between the contract price of the barge and the cost of replacing her, regard being had to the fact that replacement was impossible at the date of requisition and continued impossible for several years. The Board seek compensation for the loss of their barge measured and ascertained by the difference between the original contract price and the price they would now have to pay to replace

the barge. In this connection it is material to consider certain special facts which have been found by the arbitrator. Having regard on the one hand to the delay caused by the war, and on the other to the fact that the contractors had obtained a priority certificate for the continued construction of the barge, the arbitrator has found that if the barge had not been requisitioned by the Admiralty she would have been delivered completed to the Board in April, 1917, of course at the original contract price. The barge, however, was requisitioned, and on the facts as found, bearing in mind all the difficulties that existed during the war, including the Government control of material and the necessity of obtaining certificates before a vessel could be completed, and recognizing that the Board exercised reasonable diligence in the matter, I conclude that in no circumstances could they have had delivery of another barge designed and constructed as the original barge was until April, 1920. That is to say, if, early in 1917, soon after the requisition of the barge, the Board had set to work by a new contract to replace her, they would not have obtained delivery of the new barge completed and ready for use before April, 1920—substantially three years later than the original barge would have been completed.

On a broad view of the facts and without undue regard to minute details, the Court has to determine upon what principle the compensation to be awarded to the Board ought to be measured. In my judgment it is sufficient for the purpose of this case to say that the Board are entitled to have the property which, but for the action of the Admiralty, would have been in their possession in April, 1917, replaced by the Admiralty. As it cannot be replaced except by the expenditure of money, they are entitled to the amount of money which will represent the cost to them of the replacement. That must be measured with regard to the special circumstances arising from the war, and more especially to the increase in the value of labour and materials which has continued up to the present time. The first question put by the arbitrator should, I think, be answered in the affirmative. I can see no very material difference between the respective principles

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contended for by counsel on behalf of the Board and counsel on behalf of the Admiralty. In truth I think that both these principles lead to the same conclusion. One is assisted very much as to that by the finding of fact in para. 14 of the Special Case. It is there stated that the Board would not willingly have parted with their contract for a less sum than that for which they could have procured the building of a similar vessel. Counsel for the Board contends that the Board could not have procured a similar vessel for a less sum than they would have to pay in 1920, and if we adopt the test upon which counsel for the Admiralty insisted of the contract price of a new barge, we should come to very much the same conclusion. Whichever course we follow it seems to me that we must arrive at the same result. I have stated what I think is the answer to the first question; but of course all matters of detail are for the arbitrator.

The second question does not arise in view of the answer to the first.

The third question is whether the Board is further entitled to compensation for the loss of the services of the hopper barge during the three years mentioned, and upon what principle should the compensation, if any, be assessed. In my opinion the answer to that question is that the Board is not further entitled to compensation for the loss of the services of the barge during the period mentioned. The Board cannot, in my opinion, be in any better position as against the Admiralty in this case than that in which they would be as against a wrongdoer; and on the authorities it would seem that even as against a wrongdoer such a claim could not be maintained. Further, I think that the loss to the Board of the services of the barge during the three years in question cannot be regarded as a direct consequence of the taking of the barge by the Admiralty. That is merely another way of saying that the damage resulting from the loss of these services is too remote to be taken into account by the Court. The question of remoteness of damage is of course often one of difficulty, and it is not always easy to reconcile all the authorities. I think however that the principle applicable

to cases of this kind is well settled, and I am satisfied that it would exclude compensation for loss of the services of the barge. In none of the numerous cases in which the Court has had to assess the compensation to be paid to a person who has been deprived of his property by a Government requisition has it ever held that such damages could be recovered as are mentioned in the third question put to us by the arbitrator.

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For these reasons I am of opinion that the several questions raised should be answered as I have indicated.

AVORY J. I agree. I will only add a quotation from the judgment of Gorell Barnes J. in *The Marpessa* (1), which has been cited to us by counsel for the Mersey Docks and Harbour Board. The passage, which appears to me to apply to both the questions raised, is in these words: "This tribunal, in assessing . . . damages, may say, as a jury would do, 'We must act with some reasonable certainty, and you, the plaintiffs, are reasonably compensated by being awarded a sum which we are fairly satisfied you may have lost, but we cannot follow you into mere speculation.'"

ROCHE J. I agree.

Solicitors for the Mersey Docks and Harbour Board:
Rawle, Johnstone & Co., for W. C. Thorne, Liverpool.

Solicitor for the Commissioners of the Admiralty: *The Treasury Solicitor.*

(1) [1906] P. 14, 33, affirmed *ibid.* 95, and [1907] A. C. 241.

J. R.

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May 17.

[THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* WILLIAM CRANE.

*Criminal Law—Mistrial—Prisoners separately indicted—Joint Trial—
Venire de novo.*

Two prisoners separately indicted, one for receiving and the other for stealing certain skins, were tried together and convicted :—

Held, that the trial was a nullity and void ab initio and that a venire de novo should be awarded.

Rex v. Baker (1912) 7 Cr. App. R. 217 and *Rex v. Wakefield* [1918] 1 K. B. 216 followed.

APPEAL against conviction.

An indictment was preferred at the City of Leicester Quarter Sessions against the appellant charging him with having received certain skins well knowing them to have been stolen. A man named Morton was charged in a separate indictment with having stolen the skins. Although the appellant and Morton were not jointly indicted they were tried together, and the appellant was convicted of receiving and Morton of stealing the skins. The fact that the prisoners had not been jointly indicted was not brought to the notice of the Recorder or of the counsel appearing in the case, but the appellant having given notice of appeal, the fact that there were separate indictments, and no joint indictment, was discovered in the office of the Registrar of the Court of Criminal Appeal. Morton did not give any notice of appeal.

G. Wightman Powers for the appellant. The trial of the appellant jointly with another man who was separately indicted was such an irregularity that the conviction ought to be quashed. Evidence was admitted at the trial which though admissible against the other prisoner was not admissible against the appellant. In the circumstances of this case there is no power to award a venire de novo. That power only exists where there has either been a defect in the tribunal so as to render it incompetent to try the

case: *Rex v. Wakefield* (1), or where the plea or verdict is ambiguous: *Rex v. Baker* (2); *Rex v. Ingleson* (3); *Rex v. Golathan*. (4) The present case does not fall within either category. [He also referred to *Reg. v. Bertrand* (5) and *Reg. v. Brett*. (6)]

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F. Hinde for the Crown. There has been no valid trial of the indictment against the appellant. The verdict and sentence should be set aside and an order made for the trial of the indictment as was done in *Rex v. Baker*. (2)

The judgment of the Court (the Earl of Reading C.J. Avory and Roche JJ.) was delivered by

EARL OF READING C.J. The appellant was convicted of receiving certain skins well knowing them to have been stolen. He gave notice of appeal against the conviction to this Court, alleging as the grounds of his appeal misdirection and the misreception of evidence. It was then discovered that another man named Morton who had been separately indicted for stealing the skins had been tried with the appellant and had also been convicted. It was apparently assumed by the learned Recorder and also by the counsel appearing for the prosecution and the prisoners that the appellant and Morton were jointly indicted, the two prisoners having been given in charge of the same jury as if they had been jointly indicted under one and the same indictment, whereas, as we now know, there was a separate indictment against each of them. Morton has not appealed against his conviction.

The result in our opinion is that there has been no trial. The two prisoners could not be given in charge of the jury on two separate indictments in the same way as if they had been jointly indicted. The proceedings were void ab initio; from the moment the prisoners were given in charge of the jury the trial was a nullity. It has been contended on behalf

(1) [1918] 1 K. B. 216.

(2) 7 Cr. App. R. 217

(3) [1915] 1 K. B. 512.

(4) [1915] W. N. 45; 11 Cr. App.

R. 79.

(5) (1867) L. R. 1 P. C. 520.

(6) (1848) 3 Cox C. C. 79.

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of the appellant that what happened was a mere irregularity, and that the Court is not bound to treat the trial as a nullity. The object of that argument was to enable the appellant to contend that there had been a misreception of evidence, that is, of evidence which though admissible against Morton was not admissible against the appellant, and that this Court ought therefore to quash the conviction of the appellant. But that argument places the appellant in a difficulty, for it is based upon the admission that it was wholly wrong to give the two prisoners in charge of the same jury, and when once that is admitted it follows that the subsequent proceedings were not irregular in the sense that an irregularity occurred in the course of a trial which was otherwise perfectly valid, but that they were irregular by reason of the fact that the Court was not validly constituted for the purpose of the trial. The Recorder purported to try at the same time two men who were charged under separate indictments. He had no power to do that, and the proceedings must therefore be treated, not as a trial in which some irregularity occurred, but as not being a trial at all.

That is in accordance with the view taken in this Court in *Rex v. Baker* (1); *Rex v. Ingleson* (2); *Rex v. Golathan* (3); and *Rex v. Wakefield*. (4) In each of these cases the Court ordered a venire de novo, treating the trials as nullities. In the first three cases the question arose as to the circumstances in which a plea of guilty had been entered, and this Court having come to the conclusion that the prisoner had pleaded guilty under a mistake held that the plea and the subsequent proceedings thereon must be treated as a nullity and that in the circumstances the Court had power to order the cases to be tried. In *Rex v. Wakefield* (4) it was discovered after the prisoner had been convicted that one of the jurors summoned to serve on the jury had been personated on the jury by another man who was not qualified to serve, and this Court

(1) 7 Cr. App. R. 217.

(2) [1915] 1 K. B. 512.

(3) [1915] W. N. 45; 11 Cr. App. R. 79.

(4) [1918] 1 K. B. 216.

held that there had been a mistrial and that a venire de novo should be awarded. C. C. A.

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Acting on the principle laid down in these cases the Court in this case treats the verdict of guilty and sentence which have been recorded against the appellant as a nullity and as if they had been expunged from the record, and the Court makes the same order as was made in *Rex v. Baker* (1)—namely, that the appellant must take his trial on the indictment preferred against him—and as the appellant was in the first instance granted bail pending his trial, the same course will be followed now.

The other prisoner, Morton, has not appealed, but he will get the benefit of this decision, and there will be a new trial of the indictment against him.

Appeal allowed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

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[IN THE COURT OF APPEAL.]

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May 20.

THOMAS CHESHIRE AND COMPANY v. VAUGHAN
BROTHERS AND COMPANY.

[LIVERPOOL DISTRICT REGISTRY.]

[1919. C. 448.]

Insurance (Marine)—Agent employed to effect p.p.i. Policy—Policy to cover unusual Risk—Non-disclosure by Agent to Underwriters—Risk not covered by Policy—Action of Negligence against Agent—Defence that Policy was void—Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 4.

The plaintiffs were owners of warehouses at Liverpool, Birkenhead and Newport. From 1916 the export of nitrate of soda from South America was in the hands of the British Government, who owned the cargoes and controlled the shipping. By arrangement the plaintiffs used to warehouse the nitrate of soda arriving at Liverpool, Birkenhead, or Newport. On receiving notice of a cargo coming to one of these ports they reserved warehouse space for it, and instructed their Liverpool insurance brokers to effect a p.p.i. policy on their anticipated profits against marine and war risks, and against the risk of the cargo being diverted by the Government to another destination; and the Liverpool brokers instructed their London brokers to effect a policy covering those risks. The latter failed to disclose to the underwriters the risk of diversion, and accordingly when a vessel bound for Birkenhead with a cargo of nitrate was diverted by the Government to another port and the underwriters were sued on the policy, the underwriters successfully defended the action on the ground of non-disclosure of such an unusual risk. The plaintiffs then sued the Liverpool brokers for damages for negligence in not having effected a policy to cover the risk:—

Held, that as the p.p.i. policy, which the defendants were employed to obtain, was by s. 4, sub-s. 2 (b), of the Marine Insurance Act, 1906, void, the plaintiffs were not entitled to recover damages for breach of the contract of employment to obtain such a policy.

Cohen v. Kittell (1889) 22 Q. B. D. 680 approved.

APPEAL from the judgment of McCardie J. at the trial of the action without a jury at Liverpool. (1)

The action was brought to recover damages for alleged negligence and breach of duty on the part of the defendants as the plaintiffs' agents in procuring a policy of insurance.

The plaintiffs were warehouse owners and wharfingers at

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Liverpool, Birkenhead, and Newport, and part of their business was to receive and warehouse nitrate of soda from the west coast of South America. From the year 1916 the export of nitrate of soda from South America was in the hands of the British Government. They owned the cargoes sent from that country and the shipping was under their control. The management of the business was in the hands of Antony Gibbs & Sons, who acted as agents for the British Government. By an arrangement between Antony Gibbs & Sons and the plaintiffs the latter acted as warehousemen of the nitrate of soda when it arrived at Liverpool, Birkenhead, or Newport. The plaintiffs had incurred expense in providing accommodation for the reception of cargoes of nitrate which they expected to receive in connection with the arrangement made with Antony Gibbs & Sons. When the plaintiffs were notified that a cargo was coming to one of those three ports they were bound to reserve space for it, and if the cargo did not arrive they would suffer a loss. There were three main risks which they desired to insure: (a) the ordinary marine risks; (b) war risks; and (c) the risk of the cargoes being diverted by the Government to another destination, as the Government had power to do, with consequent loss to the plaintiffs. Accordingly in November, 1916, the plaintiffs saw the defendants, who were insurance brokers carrying on business at Liverpool, and, as McCardie J. found, stated the facts fully to them and made clear to them the risks which they desired to insure. The defendants undertook the duty of procuring from time to time policies to cover those risks. The defendants instructed their London agents, Messrs. Wackerbarth & Co., to carry out the necessary work, and the latter saw the underwriters, but failed to disclose to them the risk under head (c) which the plaintiffs desired to cover.

In December, 1917, the steamship *Glenaffric* loaded at Iquique, in South America, a cargo of 6000 tons of nitrate of soda under a bill of lading dated December 28, 1917. She was to go to a bunkering port to receive instructions as to her port of destination. Antony Gibbs & Sons intended that the *Glenaffric* should go to Birkenhead and discharge her cargo

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into the plaintiffs' warehouses, and on December 29 they wrote to the plaintiffs that the *Glenaffric* with 6000 tons of nitrate had sailed for Birkenhead. The plaintiffs at once verbally instructed the defendants to procure a policy, similar in form to the policies on other cargoes, covering the above-mentioned risks on 1300*l.* profits on the cargo of the *Glenaffric*. The defendants placed the matter in the hands of the London brokers, who handed to the underwriters a slip in this form: "To pay a total loss if the vessel does not reach destination named in the policy through any cause that may arise." There was attached to the slip a p.p.i. clause as hereinafter mentioned. Pursuant to that slip a policy was issued, dated January 14, 1918, on the cargo of nitrate of soda per the steamship *Glenaffric* from any port on the west coast of South America to Liverpool and/or Birkenhead and/or Newport and until delivered into the plaintiffs' warehouses. The policy embodied the words of the slip set out above. Before the orders for Birkenhead were sent to the master of the *Glenaffric* the British Government, for purely economic reasons and to assist the Italian Government, decided to send her to Savona, in Italy, and orders were sent to that effect, and she discharged there in February, 1918.

In an action on the policy by the present plaintiffs against the underwriters—*Cheshire & Co. v. Thompson* (1)—to recover the loss caused by the diversion, the underwriters disputed liability on the ground that disclosure had not been made to them of the special risk of diversion by the Government against which the plaintiffs desired to insure. Bailhache J., who tried the action, held that when an assured has in mind a particular and unusual risk known to himself and unknown to his underwriters he does not cover that risk by general words in a policy which, taken by themselves, are, as a mere matter of construction, wide enough to cover that risk. He accordingly gave judgment for the defendant, and his decision was affirmed by the Court of Appeal.

The plaintiffs then brought this action against the Liverpool

insurance brokers to recover damages for the negligence and breach of duty of their London agents—no negligence being complained of as against the Liverpool brokers personally—in failing to procure a policy covering the risk of diversion by the Government. The defence, after denying the allegations of negligence, pleaded, so far as material, that “by the instructions of the plaintiffs there was attached to the slip to be submitted to the underwriters and to the policy when issued a slip to the effect that the policy was made ‘without further proof of interest than the policy itself.’ The said policy was therefore void under and by virtue of s. 4 of the Marine Insurance Act, 1906 (1), and the plaintiffs could not have recovered thereon, and they did not suffer the alleged or any damage in consequence of negligence or breach of duty on the part of the defendants (if any) which is denied.”

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It appeared from the evidence that by the instructions of the plaintiffs the policies taken out for them by the defendants had attached to them a p.p.i. slip—that is to say, a slip was attached by a pin to the policy stating that “in the event of a claim arising upon this policy, the production of the same to be deemed a sufficient proof of full interest.” The instructions by the plaintiffs to the defendants were to effect a similar policy in the case of the *Glenaffric*. At the trial Mr. Thompson, the leading underwriter and the defendant in *Cheshire & Co. v. Thompson* (2), gave evidence that, apart from the defence of non-disclosure upon which he succeeded, he would not have taken any objection to the policy being a p.p.i. policy, and would have paid on it. Evidence was also

(1) 6 Edw. 7, c. 41, s. 4:
“(1.) Every contract of marine insurance by way of gaming or wagering is void.

“(2.) A contract of marine insurance is deemed to be a gaming or wagering contract—

“(a) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

“(b) Where the policy is made ‘interest or no interest,’ or ‘without further proof of interest than the policy itself’ or ‘without benefit of salvage to the insurer,’ or subject to any other like term:

“Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.”

(2) 24 Com. Cas. 114, 198.

C. A. given by the plaintiffs' manager that the underwriters on other
1920 similar p.p.i. policies had always paid on them.

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BROS. & Co. McCardie J. came to the conclusion that the defendants
must be held guilty of negligence and breach of duty in not
disclosing to the underwriters the actual risks which the
plaintiffs desired to insure and in not procuring a policy
covering those risks, but he held, upon the authority of
Cohen v. Kittell (1), that as the policy was, according to the
plaintiffs' instructions, in a form which rendered it void
under s. 4 of the Marine Insurance Act, 1906, the plaintiffs
were not entitled to any, even nominal, damages. He
accordingly gave judgment for the defendants.

The plaintiffs appealed.

A. R. Kennedy K.C. (*R. A. Wright K.C.* and *R. K. Chappell*
with him) for the plaintiffs. The p.p.i. slip is not part of the
contract contained in the policy. It is merely fastened by a pin
to the policy, and is only a memorandum for the information
of the assured that the underwriters will not put the assured
to the proof of insurable interest. It may be detached at
any time and is always detached before the trial. The policy
is not a gambling policy and the clause is not against public
policy. In *Buchanan v. Faber* (2) Bigham J., after consulting
Mathew J., heard the case as if the policy did not contain
the p.p.i. clause. That ruling is not affected by the decision
of Kennedy J. in *Gedge v. Royal Exchange* (3), where that
learned judge explained (4) that in *Buchanan v. Faber* (2)
the p.p.i. clause was treated as deleted, whereas in *Gedge's*
Case (3) it was sought to treat the policy as valid with the
vitiating clause retained as part of it. In *Gedge's Case* (3)
the plaintiff had no insurable interest, so that he was bound
to rely upon the p.p.i. clause, and if that had been deleted the
plaintiff's claim would have gone with it. Moreover *Gedge's*
Case (3) was decided under the Marine Insurance Act, 1745
(19 Geo. 2, c. 37), s. 1 (which is repealed by s. 92 of the
Marine Insurance Act, 1906), which prohibited the making

(1) 22 Q. B. D. 680.

(2) (1899) 4 Com. Cas. 223, 227*n*.

(3) [1900] 2 Q. B. 214.

(4) *Ibid.* 221.

of a p.p.i. insurance, and therefore rendered it illegal. Under s. 4 of the Marine Insurance Act, 1906, the insurance is merely void under s. 18 of the Gaming Act, 1845 (8 & 9 Vict. c. 109) ; it is not illegal. [*Royal Exchange v. Sjöforsakrings* (1) was also cited.]

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Secondly, if the p.p.i. clause is part of the policy, the case does not come within s. 4 of the Marine Insurance Act, 1906, the plaintiffs having an insurable interest. By sub-s. 2 of that section “ a contract of marine insurance is deemed to be a gaming or wagering contract ”—(a) where there is no insurable interest ; “ (b) where the policy is made ‘ interest or no interest.’ . . . ” Sub-s. 2 (b) does not apply where the assured has an insurable interest. “ Deemed ” to be a gaming or wagering contract, which applies to both clauses (a) and (b), means “ prima facie deemed,” and that inference is rebutted on proof that the assured has an insurable interest. The contract is no longer a gaming or wagering contract and therefore void under s. 18 of the Gaming Act, 1845 (8 & 9 Vict. c. 109). The editors of Arnould on Marine Insurance, 9th ed., s. 315, take this view, and it is also the view taken by Mr. Arthur Cohen K.C., who wrote the article on Marine Insurance in Halsbury’s Laws of England, vol. xvii., s. 746, where, after pointing out that at common law insurances by way of gaming or wagering were valid, and after referring to the Gaming Act, 1845, it is said : “ But a p.p.i. policy is not necessarily inconsistent with the assured having an insurable interest ; indeed, it often happens that such a policy is effected by persons who have an insurable interest but who wish to avoid the difficulty of proving it. In such case the policy would not be a wagering contract within this provision.” And in *Wilson v. Jones* (2) in the Exchequer Chamber—an action on a policy of insurance—Willes J. said : “ The argument addressed to us in opposition to this view at one time almost took the form of saying that such a contract would be a wager. If it is meant that it would be within the 8 & 9 Vict. c. 109, we must reject the argument, for that statute has no application to a contract upon a matter

1) [1902] 2 K. B. 384.

(2) (1867) L. R. 2 Ex. 139, 146.

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 1920 sub-s. 2, of the Act of 1906, is not on this view surplusage;
 CHESHIRE it was passed to discourage p.p.i. clauses being inserted in
 & Co. policies.
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 VAUGHAN Thirdly, the learned judge was wrong in holding that, as
 BROS. & Co. the policy was void, the plaintiffs were not entitled to recover
 any damages. The mandate to the defendants to effect
 a p.p.i. policy was perfectly legal. The Act of 1745 is now
 repealed. Sect. 1 of the Marine Insurance (Gambling Policies)
 Act, 1909 (9 Edw. 7, c. 12)—which makes it an offence for
 (a) a person to effect a contract of marine insurance without
 having a bona-fide interest, or (b) a person in the employment
 of the shipowner to effect a contract of marine insurance in
 relation to the ship "interest or no interest"—does not
 apply to the facts of this case. There was therefore nothing
 illegal in effecting this p.p.i. policy. The contract with the
 defendants, the agents, to effect a p.p.i. policy for the
 plaintiffs was a valid contract: *Bridger v. Savage* (1); *Read v.*
Anderson (2); and the defendants are not entitled to say that,
 as the policy so effected is void, there are no damages. The
 evidence shows that the underwriters would have paid on
 the policy, notwithstanding the p.p.i. clause, if there had not
 been a non-disclosure of an unusual risk. The underwriters
 were willing to pay, and therefore the plaintiffs are entitled
 to recover the sum insured as damages for the negligence
 in not effecting a policy to cover the risk of the ship and cargo
 being diverted by the Government, which the defendants
 had undertaken to get covered. The principle is stated in
Bridger v. Savage (1), and that principle is not affected by
 the Gaming Act, 1892 (55 & 56 Vict. c. 9): *De Mattos v.*
Benjamin. (3) McCardie J. relied upon the decision of the
 Divisional Court in *Cohen v. Kittell*. (4) That case was decided
 on wrong grounds, though the decision may be supported
 on the ground that there was no evidence that the bets, if
 made, would have been paid. Apart from that possible
 ground the decision was wrong, and should be overruled.

(1) (1885) 15 Q. B. D. 363.

(2) (1884) 13 Q. B. D. 779.

(3) (1894) 63 L. J. (Q. B.) 248.

(4) 22 Q. B. D. 680.

Further, the words "deemed to be a gaming or wagering contract," in s. 4, sub-s. 2, of the Marine Insurance Act, 1906, are limited to the immediate parties to the contract of insurance, and do not affect the right of the plaintiffs to recover damages against the defendants, who are strangers to that contract, for negligence. [*Webster v. De Tastet* (1) and *Thames and Mersey Insurance Co. v. Gunford Ship Co.* (2) were also cited.]

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At any rate, as there has been a breach of contract, the plaintiffs are entitled to nominal damages.

Greaves Lord K.C. and *Singleton* for the defendants were not called upon.

BANKES L.J. The learned judge has stated the facts fully in his judgment, and it is not necessary to go through them in detail. The plaintiffs employed the defendants to take out a policy of insurance for them to cover certain risks, and their complaint was that owing to the negligence of the brokers for whom the defendants were responsible, a policy was taken out which did not cover one of the risks which the plaintiffs had instructed the defendants to cover; and, as a result, they failed to recover on the policy and incurred costs in endeavouring to establish that the policy covered the particular risk. The defendants raised the defence that the plaintiffs instructed them to take out a p.p.i. policy and therefore were not entitled to recover any damages. That defence is founded on s. 4 of the Marine Insurance Act, 1906. It is said that, as the plaintiffs instructed the defendants to take out a p.p.i. policy which by the statute is declared to be a gaming and wagering contract and therefore void, they are not entitled in law to recover any damages. The learned judge decided that point in favour of the defendants.

Mr. Kennedy in his very careful argument raises three contentions. The learned judge has found that the plaintiffs' instructions to the defendants were to take out a p.p.i. policy, and the evidence justifies that finding. The first point is that the p.p.i. clause ought not to be considered as part of

(1) (1797) 7 T. R. 157. (2) [1911] A. C. 529.

C. A. the contract of marine insurance. It was said to be merely
1920 an intimation that the underwriters would not require proof of
CHESHIRE interest, but it was not intended by either party to be a term
& Co. of the contract. I do not express any opinion upon that
v. point. I conceive that if it were established it might remove
VAUGHAN the difficulties which judges have felt in reference to this
BROS. & Co. question of dealing with p.p.i. policies where the slip has
Bankes L.J. been previously removed. I need not say anything further
on that point, because it seems to me to be unnecessary to
do so in view of my opinion upon the second point.

The second point is that this policy is not within s. 4, sub-s. 2 (b). The section speaks of contracts of marine insurance being deemed to be gaming or wagering contracts where the policy is made "interest or no interest," etc. The contention is that as the plaintiffs had an insurable interest the section does not apply. It seems to me that the language of the section does not permit of that construction. The section is drawn for the purpose, as it seems to me, of excluding any inquiry into the question whether or not an insurable interest exists. Sub-s. 2 (b) is directed to the form of the instrument, and if it is directed to the form it must include everything which forms part of the instrument, whether it is pasted on or pinned on. In my opinion, when the section says that a contract of marine insurance is to be deemed to be a gaming or wagering contract where the policy is made "interest or no interest" or subject to any other like term, it makes void a contract where the instrument contains one of those objectionable clauses.

There remains the third point. It is said that the learned judge was wrong in holding that the contract as between the plaintiffs and the defendants was tainted because of the fact that as between the plaintiffs and the underwriters the contract of insurance was a gaming or wagering contract and therefore void. In support of that contention *Bridger v. Savage* (1) and *Read v. Anderson* (2) were referred to—and other cases might have been referred to—where under certain circumstances a person who has been employed on behalf

(1) 15 Q. B. D. 363.

(2) 13 Q. B. D. 779.

of a principal to enter into a gaming or wagering contract has been held entitled to say that a particular incident of the contract of employment was capable of being enforced even though the ultimate employment, if I may use that expression, was to make a gaming and wagering contract for the principal. In *Bridger v. Savage* (1), an agent, who was employed by his principal to make bets for him, made the bets and was paid the amount of the bets by the losers. The principal sued the agent for money had and received to his use, and recovered. It is well established that that form of action rests upon equitable grounds. I think that Manisty J. in *Cohen v. Kittell* (2) is referring to that where he says: "Doubtless, where the gambling transaction is a thing of the past, the bet having been won or lost, and the money having been received or paid, as the case may be, by the agent, it would be unjust that he should not in the one case account to, and in the other case be recouped by, his principal." *Bridger v. Savage* (1), in my opinion, depends upon that principle of law. In *Read v. Anderson* (3) the agent asserted that his principal had no right to withdraw his authority to pay a bet which he, the agent, had been instructed to make for the principal and which had been made in the agent's name and lost. There, as it seems to me, on a somewhat similar view of the law the Court held that it would be unjust to the agent, who had acted upon the instructions of his principal, that he should not be allowed to claim the benefit of so much of his contract as involved an indemnity by his principal in case he was called upon to pay the bet.

Those cases, it seems to me, are distinguishable from the present case. The agent is not calling upon his principal to make good any injury which he, the agent, has suffered or will be certain to suffer as a consequence of acting upon his instructions. The agent has suffered no such loss. It is a case where the principal says to the agent: "You are responsible to me in damages because you did not make this gaming and wagering contract in accordance with my instructions."

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(1) 15 Q. B. D. 333. (2) 22 Q. B. D. 683.
(3) 13 Q. B. D. 779.

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 —
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McCardie J. has held that this case is covered by the authority of *Cohen v. Kittell* (1) and *Webster v. de Tastet*. (2) I agree with his decision. In *Cohen v. Kittell* (1) the plaintiff claimed damages because the defendant had not made bets for him which he, the defendant, had been instructed to make, and the Court (Huddleston B. and Manisty J.), having had *Bridger v. Savage* (3), *Read v. Anderson* (4) and *Webster v. de Tastet* (2) cited to them, held that the action was not maintainable. Huddleston B., having read s. 18 of the Gaming Act of 1845, which provides that all contracts or agreements whether by parol or in writing by way of gaming or wagering shall be null and void, said: "The contract of agency, therefore, for the breach of which the plaintiff sues the defendant, is one by which the plaintiff employed the defendant to enter into contracts which, if made, would have been null and void, and the performance of which could not have been enforced by any legal proceeding taken by the defendant for the benefit of the plaintiff. The breach of such a contract by the agent can give no right of action to the principal." I agree with that statement of the law, and with the conclusion arrived at. But it is not necessary to agree with the sentence which immediately follows, where the learned judge said: "I see no difference between the case and the employment of an agent to do an illegal act." Now there obviously is a distinction, and in many cases a very material distinction, between instruction to do an illegal act and instruction to do an act which the Legislature merely makes void. But in this particular case I do not think it is necessary to consider that. I am not sure that the other case upon which McCardie J. relied—*Webster v. de Tastet* (2)—may not turn upon considerations of a rather different character from those which underlie the judgment in *Cohen v. Kittell*. (1) I agree with the judgment of McCardie J. upon the ground that the employment by the principal of an agent to do an act which is by law declared to be a void act is one which gives the principal no right of action.

(1) 22 Q. B. D. 680, 682.

(2) 7 T. R. 157.

(3) 15 Q. B. D. 363.

(4) 13 Q. B. D. 779.

I think that there may be another ground upon which the view of the learned judge can be supported, although it is not one upon which it is necessary to express a definite opinion. It may well be that the making of a p.p.i. policy is against public policy, in spite of the change that has been introduced by the repeal of the Marine Insurance Act, 1745, which made such an assurance illegal, and the substitution of s. 4 of the Marine Insurance Act, 1906, which merely makes it void as a gaming and wagering contract, because the main evil which it was intended that the earlier Act should deal with, as recited in the preamble, was as great when the Act of 1906 was passed as it was in 1745. It may have to some extent changed its form, but the evil is the same evil, and the mere alteration of the language of the statute cannot, I think, be readily accepted as indicating an alteration in the view of the Legislature in reference to such a contract. If the law be that the true view of a p.p.i. policy is that it is against public policy and that these statutory enactments are merely the result of its being against public policy, it follows that a contract to enter into a contract which is against public policy must, it seems to me, itself be against public policy. But that is a more difficult question requiring more consideration possibly than one has been able to give to it, and I do not wish to express any decided or definite opinion upon it. I prefer to rest my judgment on the ground indicated by Huddleston B. in *Cohen v. Kittell*. (1)

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SCRUTTON L.J. Mr. Kennedy's very careful argument has not persuaded me that the judgment of McCardie J. is erroneous. As the point is one of commercial and general importance, and as it is possible to think in this case that it is working an injustice to the parties concerned, I desire to express my reasons in my own words.

Some Liverpool warehousemen used to receive cargoes of nitrate for warehousing at three ports. The trade at that time was under the control of the Government, so that ships which started for a particular port might be diverted to

C. A. other ports or other countries. The warehousemen desired
1920 to insure the profits which they expected to make from the
CHESHIRE nitrate coming to their warehouse by insuring the non-arrival
& Co. of the ship by reason of her diversion by the Government to
v. other ports. They accordingly gave a Liverpool firm of brokers
VAUGHAN instructions to effect policies which would cover that particular
BROS. & Co. source of loss. It is clear to my mind that, in view of the
Scrutton L.J. difficulty of proving the actual loss, because when they knew
the ship was not coming they would naturally endeavour
to fill the vacant space in their warehouse with other goods,
and a somewhat complicated question might arise as to
the amount of loss, they intended that their policies should
have on them what is known in business as the p.p.i. clause,
the effect of which is that the mere production of the policy
is evidence of interest to the full amount mentioned in the
policy.

For many years there has been an unfortunate conflict between the statute law and the practice of business men. It has been extremely common to place in policies a p.p.i. clause providing that there shall be no necessity to prove the amount of loss, although all the time there was a statute which said that such a clause was either illegal or null and void. It is unfortunate that that practice has prevailed, because while, on the one hand, there are undoubtedly cases where there is a real loss, but it is difficult to prove its exact amount, and it is convenient in a business sense to have it assessed beforehand, on the other hand, there is no doubt that cases of deliberate attempts to get insurance money where there is no insurable interest, and cases of over-valuation on the chance of a loss, are all rendered possible by the continued insertion of a p.p.i. clause. Apart from the fact that the clause facilitates fraud, as it does in many cases, a practice has arisen with regard to it which places judges in great difficulty. It is the duty of judges, if they know that a policy has that clause on it, to treat it as null and void under the Act, and a practice has grown up of deceiving the Court by parties tearing off the clause which they have put on the policy in the hope that the Court will not know that there is

such a clause and will give effect to the policy. The Court does not generally know, but having had some commercial experience suspects what those two pinholes in the margin of the policy mean, and still more when it sees that a piece of paper has been torn off. Judges are therefore placed in a difficult position—at least, I personally feel the difficulty—when they strongly suspect that they are being asked to enforce a null and void contract, but have no evidence beyond the kind of indications that are on the policy. However, that is the practice, and the only thing to be said to business men who carry on business in that way is, that if they persistently enter into contracts which are null and void under a statute, they must not complain if the Courts obey the statute rather than their commercial practice.

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In this case the p.p.i. clause was pinned on to the policy. It turned out that the London agents of the Liverpool brokers who were instructed to effect the policy did not convey to the underwriters the exact nature of the risk which they were asked to insure. They used general words which would cover the risk, but they did not convey to the minds of the underwriters that what the plaintiffs desired to cover was a special form of risk—namely, the diversion of the ship by Government orders to another port or country. In consequence when the *Glenaffric* was diverted to Italy and a claim was made under the policy, the underwriters raised the defence of non-disclosure of that special risk, and that the general words did not cover it. It may be put as concealment ; it may also be put that the language under the circumstances did not cover the loss. Bailhache J. and the Court of Appeal (1) held that the underwriters were not liable. The p.p.i. slip had been taken off the policy ; so neither Court thought that the transaction they were being asked to deal with was null and void under the statute.

The Liverpool warehousemen, not being able to recover on their policy, brought an action for negligence against the Liverpool brokers. The defendants have pleaded that the plaintiffs cannot recover any damages, because they

(1) 24 Com. Cas. 114, 198.

C. A. instructed the defendants to take out a p.p.i. policy which
1920 is null and void. McCardie J. has held that that defence is
CHESHIRE & Co. good.
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BROS. & Co. Mr. Kennedy takes three points against the learned judge's
Scrutton L.J. decision. He says, in the first place, that this clause is not
part of the policy. It is merely an informal intimation that
in proceedings on the policy a certain course may be taken
by the underwriters, but it is not part of the policy. I am
not able to accept the position that slips on a policy are not
part of the policy. A contract of marine insurance must
be expressed in a policy, and here is the policy with the slip
attached to it. I do not see any ground for holding that slips
on the policy are merely intimations to people as to what
may happen in regard to the policy, but are not part of the
policy.

The second point depends upon the construction of s. 4 of the Marine Insurance Act, 1906. The argument, if I understand it rightly, is that sub-s. 2 means that the contract is prima facie deemed to be a gaming and wagering contract, but that inference may be rebutted by showing that the assured had either an insurable interest or an expectation of acquiring one. That is, in effect, to read clause (a) of sub-s. 2 into clause (b). I see no ground for cutting down the section in that way. It seems to me Parliament has said that if this clause is in the policy it is to be deemed to be a gaming and wagering policy, because it is a gaming and wagering clause. In my view the second point fails.

The third point is the only one which has caused me any difficulty. It is said that, even if the contract is null and void, the strong probability is that, but for the defendants' negligence in not disclosing the risk the plaintiffs would have recovered on the policy, as the underwriters would not have taken the objection that the p.p.i. clause was in the policy and the Court would not have known of it, and that therefore the plaintiffs can recover damages.

In my view the principle on which this case should be decided is this, that a contract declared by the law to be null and void cannot be either directly or indirectly the basis of a legal

claim. There are contracts to which there is no objection and which are legally enforceable in the ordinary way. There are also contracts which are not illegal or null and void, but which under the Statute of Frauds are only enforceable in law by a certain procedure—namely, evidence in writing. In that class of case, which I call contracts of imperfect obligation, the relation which cannot be enforced may yet have indirectly a number of legal consequences. They will be found stated in Pollock on Contracts, 8th ed., under Agreements of Imperfect Obligation, pp. 694 et seq. The next class of case is where the contract is declared null and void, but not illegal. In my view the Court must give full effect to the nullity and invalidity which the statute declares, and cannot consider as the basis of a legal obligation a set of relations which Parliament has declared to be null and void. For instance, a prominent class of null and void contracts are betting contracts. It seems to me to be clear that a person cannot put forward as a ground for damages that his agent has not made a bet which the agent was employed to make. The bet would have been null and void, and there cannot be an inquiry into a cause of action on a null and void transaction to see what would have happened if the agent had made the bet, or if he had made it carelessly with an insolvent bookmaker, or for less than the amount at which he was instructed to make it. If there could be such an inquiry it would be treating as of some validity a transaction which the Legislature had said should be null and void. The principle therefore on which I decide this point is this: That the Court cannot give effect to a transaction which Parliament has declared to be null and void. The only exception, and I am not sure that it is an exception, is that when a person has received money for another it is no answer for him to say that he received it in respect of a null and void transaction. He has received it, and the receipt cannot be treated as null and void. *Bridger v. Savage* (1) appears to me to be a good example of that kind of case, and it rests upon the actual receipt of property. Many people thought *Read v. Anderson* (2)

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(1) 15 Q. B. D. 363.

(2) 13 Q. B. D. 779.

C. A. wrong. Parliament dealt with it summarily in the Gaming
1920 Act, 1892 (55 & 56 Vict. c. 9); but it may be that it may
CHESHIRE be brought under the same principle. It is quite possible to
& Co. bring it within the principle stated by Lord Ellenborough
v. in *Griffith v. Young* (1): "If one agree to receive money
VAUGHAN for the use of another upon consideration executed, however
BROS. & CO. frivolous or void the consideration might have been in respect
Scrutton L.J. of the person paying the money, if indeed it were not
absolutely immoral or illegal, the person so receiving it cannot
be permitted to gainsay his having received it for the use of
that other." That may be the principle which may justify
proceedings in respect of the receipt of money under a null
and void contract which would not apply to any other form
of utilizing the transaction as the basis of a legal obligation.
I prefer to rest my answer to the third point on the principle
I have stated above; but I am not at all sure, and I should like
to reserve it for further consideration, whether the objection
to this action and to actions of a similar character in respect
of bets cannot be put on the ground that the transactions
which are being investigated are contrary to public policy.
I am not sure that the legislation against these p.p.i. clauses
and against betting may not be rested on the fact that the
transactions are contrary to public policy. But I should like
a fuller consideration of that aspect of the case before deciding
it on that ground. I am content to leave the decision on the
ground that a transaction declared null and void by statute
cannot be made the basis directly or indirectly of an action.

For these reasons I think that the judgment of the learned
judge was right, and that this appeal fails.

ATKIN L.J. I agree, but I should like to add a few words
out of regard to the admirable argument which has been
addressed to us by Mr. Kennedy. His first point was that
the attached slip was not part of the contract of insurance.
I do not think that can be supported. It may be tested in
this way. Supposing there were perfectly valid terms
expressed in the slip attached to the policy, could it be said

that those terms were not a part of the contract of insurance ? Neither party suggests that for a moment. I think the intention of the parties was, and must be taken to have been, in view of the fact that they attached the slip to the written document and signed the document with the slip attached, to include in the contract the terms contained in the slip.

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The next point was that the contract was not within s. 4 of the Marine Insurance Act, 1906, because the assured had in fact an insurable interest ; and that the avoidance of the contract when it is made " interest or no interest " or " without further proof of interest than the policy itself," or " without benefit of salvage to the insurer " or subject to any other like term, is merely a provision that under those circumstances it is *prima facie* deemed to be a gaming or wagering contract. I think that the words are inconsistent with that view, and it appears to me to be plain, when one considers the history of the clause and remembers s. 1 of the Marine Insurance Act, 1745, which is repealed, that that was not the intention of the Legislature. I think that this contract was " subject to a like term," and must be deemed to be a gaming or wagering contract.

The third point is this : It was said that the contract of employment of the broker was a perfectly legal contract and that there was a breach ; and that in assessing the damages there can be taken into account the probability that the contract which the agent was employed to make, though void, would have resulted in an advantage to the plaintiffs, and may therefore give rise to damages. To my mind the first part of that argument is substantiated. I see nothing in the Act to make the employment of the insurance broker an illegal or void contract. Once it is made out that the contract of insurance was a gaming or wagering contract it is put upon the same footing as a bet on a horse race, and it seems to me to have been decided in *Read v. Anderson* (1), an authority binding upon this Court, that the employment of an agent to make a bet on a horse race gives rise to a valid contract as between the principal and the agent, on which

(1) 13 Q. B. D. 779.

C. A. the agent can sue the principal for an indemnity as being
 1920 an implied term of the contract of employment. The decision
 CHESHIRE of the majority of the Court of Appeal in *Read v. Anderson* (1)
 & Co. is, to my mind, inexplicable except upon the footing that they
 v. considered the contract of employment to be a valid contract.
 VAUGHAN They said so ; and it was again stated to be valid in *Bridger v.*
 BROS. & Co. *Savage*. (2) Therefore I think that the contract of
 Atkin L.J. employment was a valid contract.

There still remains the question, What damages can be recovered by the principal if the agent breaks that contract? In my opinion where the employment is to make a contract which is null and void, if the agent breaks the contract of employment his principal has no right to damages, whether nominal or substantial, if the only breach alleged is an omission by the agent to make the void contract, or default in making it with reasonable care. *Cohen v. Kittell* (3) is an authority for that proposition. I think that case is based upon sound reason except for one sentence in the judgment of Huddleston B., where he says that he sees no difference between that and an employment to make an illegal contract. It appears to me there is very considerable distinction, and it follows that I do not agree with the passage in the judgment of McCardie J. (4) : " Now I conceive that on principle it would be right to say that the plaintiffs could not recover, for I should deem the true rule of law to be that a contract by one person to procure for another a contract, which would be void as against public interest, should itself be void." For that he cites the case of *Cohen v. Kittell*. (3) If the learned judge meant by "void as against public interest," "illegal," I think the proposition would be sound; but it would not be the case before us. In *Webster v. de Tastet* (5) the contract was treated as illegal in the sense that it was considered to be against public policy to insure seamen's wages.

For these reasons I think that the judgment of the learned judge below should stand. But I desire, as the other members

(1) 13 Q. B. D. 779.

(3) 22 Q. B. D. 680.

(2) 15 Q. B. D. 363.

(4) 25 Com. Cas. 58.

(5) 7 T. R. 157.

of the Court have done, to reserve the question as to whether or not this contract to make a p.p.i. policy is an illegal contract. I do not further discuss it except to say that when it has to be considered it will probably be necessary to consider what the law was before the Act of 1745, as to which there is an extensive discussion in the Exchequer Chamber in *Cousins v. Nantes* (1) ; and I think it will probably be necessary, in considering what the law is after the passing of the Act of 1906, to take into account the provisions of the Marine Insurance (Gambling Policies) Act, 1909, which deals to a limited extent with these policies. I also wish to say for myself that in this particular case it has been assumed by everybody that, if in fact the sub-agent, the insurance broker in London, was negligent, the defendants, the country insurance brokers, were responsible for that negligence. I express no opinion upon that matter. It may be perfectly true. I can however imagine circumstances in which a country agent, if he is contemplating the employment of a London agent, may not be responsible for the negligence of that sub-agent if in fact he himself has used reasonable care in the selection of the sub-agent. That is a matter which does not arise now, and I only mention it. I agree that the appeal should be dismissed.

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Appeal dismissed.

Solicitors for plaintiffs: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

Solicitors for defendants: *Finch, Jennings & Tree, for Weightman, Pedder & Co., Liverpool.*

(1) (1811) 3 Taunt. 513.

W. F. B.

1920

LADY WYNDHAM *v.* COMMISSIONERS OF INLAND
REVENUE.

June 2.

*Revenue—Super Tax—Separate Assessments on Incomes of Husband and Wife
—Death of Husband—Liability of Wife to pay for whole Year at Rate
applicable to combined Income of herself and Husband—Finance Act,
1912 (2 & 3 Geo. 5, c. 8), s. 6—Finance Act, 1914 (4 & 5 Geo. 5, c. 10), s. 9.*

By s. 6 of the Finance Act, 1912, "In the case of the death of a person liable to super tax during any year for which super tax is charged, a part only of the year's super tax shall be payable proportionate to the part of the year which has elapsed before the date of the death." Under s. 9 of the Income Tax Act, 1914, on an application for that purpose being made income tax including super tax shall be assessed, charged and recovered on the income of a husband and on the income of his wife as if they were not married, the income of the husband and wife being treated as one in estimating total income for the purpose of super tax, and the amount of super tax payable in respect of the total income being divided between the husband and wife in proportion to their respective incomes, but the total amount payable shall not be less than it would have been if an application had not been made under the section.

A husband and wife were separately assessed to super tax in accordance with the provisions of s. 9 of the Finance Act, 1914, at the rate applicable for that year based on their combined income. The husband died during the year of assessment. The wife claimed that under s. 6 of the Finance Act, 1912, she was only liable to pay super tax at the rate applicable to the combined income of herself and her husband for the proportion of the year that had elapsed before the death of the husband:—

Held, that s. 6 of the Finance Act, 1912, only applied to the super tax which the deceased person was liable to pay. The deceased person and his wife were under s. 9 of the Act of 1914 to be treated for the purposes of super tax as if they were not married. The wife had therefore taken upon herself liability for super tax at the rate which at the date of the assessment was the correct rate, and that assessment remained in force.

CASE stated under s. 72, sub-s. 6, of the Finance (1909–10) Act, 1910, and s. 59 of the Taxes Management Act, 1880, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court.

At a meeting of the Commissioners held on May 28, 1919, for the purpose of hearing appeals, Lady Wyndham, herein-after called the appellant, appealed against an assessment to super tax in the sum of 8488*l.* for the year ending April 5,

1919, made upon her under the provisions of the Finance (1909-10) Act, 1910, and subsequent enactments.

The sole point for the determination of the Court was whether the appellant was liable to pay super tax for the whole or only a part of the year in question at the rate of tax applicable for that year based on the combined income in the previous year of herself and her husband.

The appellant was the widow of the late Sir Charles Wyndham, who died on January 11, 1919.

Under s. 9, sub-s. 1, of the Finance Act, 1914, "if an application is made for the purpose . . . either by a husband or wife, within six months before the 6th day of May in any income tax year—(a) income tax (including super tax) for that year shall be assessed, charged, and recovered on the income of the husband and on the income of the wife as if they were not married, and all the provisions of the Income Tax Acts with respect to the assessment, charge, and recovery of income tax (including super tax), and the penalties for failure to make a return, shall apply as if they were not married; and . . . (f) the income of the husband and wife shall be treated as one in estimating total income for the purpose of super tax, and the amount of super tax payable in respect of the total income shall be divided between the husband and wife in proportion to their respective incomes, and the total amount payable shall not be less than it would have been if an application had not been made under this section."

Application for separate assessment to super tax for the year in question having been made under s. 9 of the Finance Act, 1914, on behalf of the appellant (the date of such application being May 3, 1918), and separate returns having been made for the purpose by Sir Charles Wyndham and the appellant, separate assessments were accordingly made on Sir Charles Wyndham and on the appellant.

These assessments were arrived at as follows :—

Joint total income of Sir	£	s.	d.	£	s.	d.
Charles Wyndham and						
the appellant for the year						
ended April 5, 1918	..			21,333	0	0

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COMMISSIONERS.

1920		£	s.	d.
WYNDHAM (LADY) v. INLAND REVENUE COMMISS- SIONERS.	Total income of Sir Charles Wyndham for the said year	12,845	0	0
	Total income of the appel- lant for the said year ..	8488	0	0
		<hr/>		
		£21,333	0	0

	£	s.	d.	£	s.	d.
Super tax payable for the year of assessment on the joint total income at the rates in force for that year—namely, the rates set out in s. 20, sub-s. 1, of the Finance Act, 1918 ..				3737	8	6

A division of such super tax between Sir Charles Wyndham and the appellant in proportion to their respective incomes made in accordance with the provisions of s. 9 (f) of the Finance Act, 1914, set out above results in :—

Liability to super tax of Sir Charles Wyndham and amount of assessment in fact made on him ..	2250	7	6
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Liability to super tax of appellant and amount of assessment in fact made on her	1487	1	0
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£3737 8 6

Sect. 6 of the Finance Act, 1912, provides that “in the case of the death of a person liable to super tax during any year for which super tax is charged, a part only of the year’s

super tax shall be payable proportionate to the part of the year which has elapsed before the date of the death."

By virtue of this section the executors of the will of Sir Charles Wyndham did not pay the full duty applicable to Sir Charles' income as assessed for the year 1918-19—namely, 2250*l.* 7*s.* 6*d.*—but only that part of such duty proportionate up to the date of his death—namely, 1732*l.* 9*s.* 8*d.*

On behalf of the appellant it was contended that the fact that an application for separate assessments had been made did not operate to deprive the appellant of the advantage which would have been hers by virtue of s. 6 of the Finance Act, 1912, if such application had not been made; and further that from the date of Sir Charles Wyndham's death the appellant should be treated as a feme sole and should not for that period be assessed at a rate of tax applicable to the amount of the total of her income plus the income of Sir Charles Wyndham, and that the relief granted by s. 6 of the Finance Act, 1912, set out above applied to the total super tax on the joint income of Sir Charles Wyndham and the appellant.

On behalf of the respondents it was contended that the assessment on the appellant was correctly made, and that there was no provision in the Income Tax Acts under which the appellant could claim any reduction of the duty under such assessment by reason of the death of Sir Charles Wyndham.

The Commissioners were of opinion that the assessment, the subject of this appeal, was correctly made in accordance with the provisions of the Acts, and that there was no provision by virtue of which the charge or rate of duty upon such assessment could be reduced, and they therefore confirmed the assessment.

Montgomery K.C. and *Latter* for the appellant. The "year's super tax" mentioned in s. 6 of the Finance Act, 1912, is in the case of the death of a married person the super tax in respect of the joint income of husband and wife and not merely the super tax assessed upon the deceased

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person. That section has exactly the same effect whether or not an application for separate assessment is made by a husband and wife under s. 9 of the Finance Act, 1914, and under that section part only of the super tax is payable in respect of the joint income of husband and wife proportionate to the part of the year which has elapsed before the death of the husband or wife as the case may be. Section 9 of the Finance Act, 1914, does not alter the total amount of super tax payable on the joint incomes of husband and wife in any given circumstance whether or not an application for separate assessment is made under that section.

Sir Ernest Pollock S.-G. and R. P. Hills for the Commissioners were not called upon to argue.

ROWLATT J. I need not trouble you, Mr. Solicitor. It seems to me that this is a very clear case. Lady Wyndham seeks relief against the consequences of an assessment upon her in respect of her income, made under the provisions of s. 9 of the Finance Act, 1914, which enables a husband and wife to claim to be separately assessed. She was separately assessed to super tax, in the words of the Act of Parliament, as if she were not married. But she was separately assessed in accordance with the provisions of that Act at the rate applicable to the combined incomes of herself and her husband. That provision is necessary for the protection of the Crown. She got herself assessed as if she were an unmarried woman and now she objects to that assessment because her husband is dead. The Crown no doubt is sorry that her husband is dead, especially as it means that some portion of the husband's super tax will not be paid, but the Crown's contention is that the fact that the appellant's husband is dead has no relevance with regard to the appellant's super tax, and I agree with that view. The appellant is still alive, and there is nothing wrong with the assessment upon her. The only question is whether she can get relief under s. 6 of the Finance Act, 1912. That section provides that "in the case of the death of a person liable to super tax during any year for which super tax is charged, a part

only of the year's super tax shall be payable proportionate to the part of the year which has elapsed before the date of the death." It is perfectly clear that the super tax, a part only of which is to be paid, is the super tax to which the person who has died is liable. The section does not refer to the case of married persons at all. There is nothing in that section to suggest that the death of a married person affects an existing separate assessment on the surviving spouse. But even if one could read the two sections of the two Acts as being connected, the answer would still be that by the very provision of s. 9 of the Act of 1914 these persons, though married, are for super tax purposes to be treated as if they were not married. They have severed their super tax liability and each of them has taken that liability upon himself and herself at the rate which at the date of the division was the correct rate, and there it remains unless there is something in an Act of Parliament which enables me to alter it; and there is nothing. The appeal must therefore be dismissed.

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Appeal dismissed.

Solicitors for appellant: *Stanley, Hedderwick & Co.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

R. F. S.

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June 2.

GREAT WESTERN RAILWAY COMPANY, ON BEHALF
OF W. H. HALL, CLERK TO THE GREAT WESTERN
RAILWAY COMPANY *v.* BATER, SURVEYOR OF
TAXES.

Revenue—Income Tax—Office or Employment of Profit under Public Corporation—Clerk in Employment of Railway Company—Liability of Railway Company to Assessment—Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 146, Sch. (E)—Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Sch. (E)—Income Tax Act, 1860 (23 & 24 Vict. c. 14), s. 6.

A railway company had a clerk in their employ on the permanent staff who had been in their employ for over twenty years and was in receipt of a salary of 130*l.* a year plus a war bonus of 45*l.* Clerks in the company's employ received an annual increase until a salary of 100*l.* was reached. Subsequent advances were dependent upon merit and the nature of the post occupied. The salary was payable every twenty-eight days, but an interim payment on account approximating to one-half of a month's salary was made at the expiration of fourteen days. The employment might be terminated by either party upon a month's notice, but failing such notice the employment continued. This particular clerk was a member of the superannuation scheme of the company and would on attaining the age of sixty, if still in the service of the company, be entitled to a pension:—

Held, that permanent officials of a clerical kind in the service of a railway company were officers within Sch. (E) of the Income Tax Acts, and that therefore the railway company was properly assessed to income tax under Sch. (E) in respect of the office or employment of profit held under the company by the particular clerk in question.

CASE stated under s. 59 of the Taxes Management Act, 1880, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court.

At a meeting of the Commissioners held on January 2, 1919, for the purpose of hearing appeals the Great Western Railway Co. (on behalf of W. H. Hall), hereinafter called the appellant company, appealed against an assessment to income tax under Sch. (E) on the sum of 175*l.* for the year ending April 5, 1918, made upon them under the provisions of the Income Tax Acts in respect of an office or employment of profit held in or under the appellant company by the said W. H. Hall.

No dispute arose in the case upon the question of

the amount of salary paid by the appellant company to W. H. Hall, the sole question for the determination of the Court being whether the appellant company had rightly been assessed on behalf of W. H. Hall under Sch. (E) of the Income Tax Acts.

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W. H. Hall entered the service of the appellant company in the year 1897 at the age of about fourteen years as an office boy and was employed in the Divisional Superintendent's office at Swindon. In February, 1899, he was appointed a lad clerk and in 1901 a clerk in the service of the appellant company. Mr. Hall was so appointed at an annual salary payable every twenty-eight days on the basis of 28/365ths of the annual amount, but in practice an interim payment on account approximating to one-half of a month's salary was made at the expiration of the first fourteen days of each period of twenty-eight days. There was not and never had been any written agreement as to the amount or times of payment or increase of rate of salary, but Mr. Hall had enjoyed the benefit of a practice instituted since his appointment under which the salary of a clerk was increased by annual increments of 5*l.* until a salary of 100*l.* was reached, beyond which amount advances were dependent upon merit and the nature of the post occupied. Mr. Hall's salary during the year in question was at the rate of 130*l.* per annum plus a war bonus of 45*l.* His employment might be terminated by either party upon a month's notice, and failing such notice the employment continued and would not be required to be renewed by either party. Pay was granted to Mr. Hall for each day of the year including holidays, and in the case of sickness he received full pay for the first twenty-eight days and five-sixths for the period of six months after the expiration of twenty-eight days. He became a member of the superannuation fund on February 13, 1899, and when on July 1, 1908, the superannuation scheme was substituted for the superannuation fund Mr. Hall continued membership of the superannuation scheme from that date, and would on attaining the age of sixty, and being still in the employment

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of the appellant company, be entitled to a pension in accordance with rule 6, para. (b) of the superannuation scheme of the appellant company.

On behalf of the appellant company it was contended that the intention of the Income Tax Acts as shown in the wording of the Schedule itself was to charge under Sch. (E) public offices or employments of profit and annuities, pensions or stipends payable by His Majesty or out of the public revenue of the United Kingdom, except annuities charged to the duties under Sch. (C), and that although it might be that there were words in r. 3 under Sch. (E) which might seem to include members of the staff of a railway company, the reference in that rule to offices or employments of profit held under any company must be read in the light of the words at the commencement and at the end of the rule defining its scope—namely, “all public offices and employments of profit of the description hereinafter mentioned within Great Britain . . . and every other public office or employment of profit of a public nature.” Even assuming that the principal officers of a railway company could be held to fall within the scope of Sch. (E), the junior members of the staff holding no definite appointments in the service could not be so included. In this connection reliance was placed upon the decision in *Attorney-General v. Lancashire and Yorkshire Ry. Co.* (1), and reference was made to the fact that clerks in the appellant company’s service who were engaged at weekly wages were assessed under Sch. (D), and it was contended that a clerk in the position of W. H. Hall had no more permanency of employment than officers, clerks or engine drivers engaged at weekly wages who were assessed under the rules applicable to Sch. (D), and that the fact that he was entitled to a month’s notice to terminate his employment was not sufficient ground for making any distinction between him and them. The Commissioners were asked in the above circumstances to hold that Mr. Hall was entitled to be assessed under the rules of Sch. (D) on an average of his emoluments for the past three

(1) (1864) 2 H. & C. 792; 10 L.T. 95; 10 Jur. (N. S.) 705; 33 L. J. (Ex.) 163.

years, and that the appellant company was not liable to be assessed under Sch. (E) in respect of his salary.

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The respondent contended on behalf of the Crown (inter alia) that the appellant company was a company or society within the meaning of the Third Rule, Sch. (E), s. 146, of the Income Tax Act, 1842; that the Income Tax Act, 1860 (23 & 24 Vict. c. 14), expressly provides that “the Commissioners for Special Purposes shall assess the duties payable under Sch. (E) in respect of all offices and employments of profit held in or under any railway company, . . . and the said assessment shall be deemed to be and shall be an assessment upon the company”; that the case of *Attorney-General v. Lancashire and Yorkshire Ry. Co.* (1) dealt only with manual workers and gave no decision affecting clerks; that W. H. Hall held an office or employment of profit within the meaning of the above sections, and that the appellant company was therefore rightly assessed under Sch. (E).

The Third Rule of Sch. (E), s. 146, of the Income Tax Act, 1842, says: “The said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned within Great Britain; (videlicet), any office belonging to either House of Parliament . . . any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, or under any public corporation, or under any company or society, whether corporate or not corporate . . . and every other public office or employment of profit of a public nature.”

The Commissioners who heard the appeal were of opinion that the contentions put forward on behalf of the Crown should succeed and they therefore confirmed the assessment.

Sir Lynden Macassey K.C. and *Geoffrey Lawrence* for the appellants. The railway company are not assessable under Sch. (E) in respect of Hall, as he is not the holder of an office or employment of profit of a public nature. A person must be the holder of an office with definite duties attaching to it

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of a continuous character before he can be assessable under Sch. (E). That is clearly shown from rule 1 of Sch. (E), which provides that "each assessment in respect of such offices or employments shall be in force for one whole year, and shall be levied for such year without any new assessment, notwithstanding a change may have taken place in any such office or employment, on the person for the time having or exercising the same." Hall is merely a fourth-grade clerk in the running department of the railway and is in no sense of the word an officer. In the Railway and Canal Commission Court officers have been contrasted with labourers and the clerical staff of a railway company. The fact that Hall is paid monthly and not weekly is immaterial. In *Attorney-General v. Lancashire and Yorkshire Ry. Co.* (1) it was held that Sch. (E) extends only to offices or employments under corporations which are of a public nature. There must be duties attaching to the office directly serving the interest of the community. Best C.J. in *Henly v. Mayor of Lyme* (2) expressed the opinion that "every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer." Cave J. in *In re Mirams* (3) said: "To make the office a public office, the pay must come out of national and not out of local funds, and the office must be public in the strict sense of that term." Hall merely performed such duties as might be assigned to him from time to time. If he left he would not have a successor but some of his work would be assigned to one person and some to another, which shows that he does not hold an office.

Sir Ernest Pollock S.-G. and R. P. Hills for the Crown. It is not true that in order to come within Sch. (E) the holders of offices and employments of profit under a railway company must have duties to perform towards the public. The persons who are brought most into contact with the public are porters who do not come within Sch. (E), whereas the higher officers who do come within Sch. (E) are not brought into contact

(1) 2 H. & C. 792; 10 L. T. 95.

(2) (1828) 5 Bing. 91, 107.

(3) [1891] 1 Q. B. 594, 596.

with the general public. The Third Rule to Sch. (E) provides that "the said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned within Great Britain; (videlicet)"; then follows a category of a great number of offices which are public offices, including "any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, or under any public corporation, or under any company or society, whether corporate or not corporate," and the section concludes with the words "and every other public office or employment of profit of a public nature." In *Tennant v. Smith* (1) the opinion was expressed by various members of the House of Lords that income arising from employment as a bank agent is assessable under Sch. (E), although a bank agent has no duties to perform to the public. Hall was paid monthly, but as no time was limited for the duration of the hiring in law the hiring was a hiring for a year: see *Smith's Law of Master and Servant*, 6th ed., p. 51. He holds an office or employment of profit under a public corporation and therefore he comes under Sch. (E), and the assessment in accordance with s. 6 of the Income Tax Act, 1860, is rightly made upon the railway company. The decision in *Attorney-General v. Lancashire and Yorkshire Ry. Co.* (2) turned upon the fact that the Court were then dealing with persons whose duties were those of labourers and who were paid weekly. If a clerk in the employment of a railway company dies or leaves a new clerk is appointed, and the duties which he has to perform are the duties which belong to the office to which he has been appointed.

Sir Lynden Macassey K.C. replied.

ROWLATT J. In this case the question is whether a man named Hall, who is a clerk in the service of the appellants, the Great Western Railway Co., is to be assessed to income tax under Sch. (D) or whether the assessment is to be made upon the appellants, as has been done, under Sch. (E) upon the footing that Hall is the holder of an office or employment

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(1) [1892] A. C. 150, 157, 159.

(2) 2 H. & C. 792; 10 L. T. 95.

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of profit within that schedule. Hall is a clerk on the permanent staff of the railway company and has been in their employ for more than twenty years. He received annual increments to his wages or salary until he received 100*l*. After that figure is reached the further emoluments of a clerk in the employ of the railway company depend upon the merits of the particular person and upon the work he is called upon to do. The merits of this particular clerk and the work which he has been called upon to do have been such that he is now in receipt of 130*l*. a year. He belongs to the superannuation scheme of the appellant company. Beyond those facts the case does not help me much. I am told that he is what is called a fourth-grade clerk, that is to say there are two or three grades above him in the office of the superintendent of the running department of the railway company.

The question is whether he holds a public office or employment of profit within Sch. (E) in s. 2 of the Income Tax Act, 1853. But it does not depend entirely upon that section, because the rules under Sch. (E) in the Act of 1842 have also to be looked at. The Third Rule says that "the said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned within Great Britain ; (videlicet)," and after mentioning a great many offices, many of which are undoubtedly public offices in every sense of the word, it says "any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, or under any public corporation, or under any company or society, whether corporate or not corporate," the word "public" not being introduced before the words "office or employment of profit" in that particular collocation. Then it is provided by s. 6 of the Income Tax Act, 1860, that in the case of railway companies "the Commissioners for Special Purposes shall assess the duties payable under Sch. (E) in respect of all offices and employments of profit held in or under any railway company . . . and the said assessment shall be deemed to be and shall be an assessment upon the company." So that s. 6 of the Act of 1860 recognizes the fact and proceeds upon the footing that under Sch. (E) there

are public offices or employments of profit held under railway companies, although it does not add of its own operation to Sch. (E). Looking at the words I have quoted from the Third Rule in the Act of 1842 one is driven to the conclusion that a public office or employment of profit within the meaning of the Schedule does not mean an office or employment which has duties direct to the public. Apart from these provisions which I have read it is quite clear from what was accepted, to put it no higher, by the House of Lords in *Tennant v. Smith* (1) that a man in the position of a bank manager, such as the bank manager in question in that case, was the holder of a public office or employment of profit within the meaning of Sch. (E), although he had no duties to perform direct to the public unless it was the duty of superintending the payment of gold against notes in Scotland. I cannot however believe that the case turned upon any such narrow point as that, and it seems to me therefore that the word "public" very nearly disappears from this definition. It may be that the word disappears altogether, because, as the Solicitor-General argued, after the word "videlicet" in the Third Rule of Sch. (E) in the Act of 1842 "offices and employments of profit under companies" are mentioned without the word "public." But at any rate I think the word "public" has practically disappeared, because I do not know what a public office is unless it is an office which involves duties to the public.

But it is contended, and this is the real point in the case, that this man Hall is not the holder of an office or employment of profit at all. It is said that he is just one of a number of clerks. I gather that is the point, although it is not specifically so stated in the case before me. It is said that the position which he holds is not the sort of office that is referred to in this Schedule, and it is pointed out that under rule 1 of Sch. (E) in the Act of 1842 the assessment is to be made for a year in respect of the office, and that it shall be in force for a whole year and levied without any new assessment, notwithstanding a change has taken place in the office or employ-

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(1) [1892] A. C. 150.

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ment, on the person having or exercising the same. In this case that would not have effect, because the assessment would be on the railway company. It is pointed out that in the case of a man dying or leaving the office he is responsible for the proportion of arrears and the proportionate part of the current year. It is argued, and to my mind argued most forcibly, that that shows that what those who used the language of the Act of 1842 meant when they spoke of an office or an employment of profit was an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders, and that if a man was engaged to do any duties which might be assigned to him, whatever the terms on which he was engaged, his employment to do those duties did not create an office to which those duties were attached; he was merely employed to do certain things, and the so-called office or employment was merely the aggregate of the activities of the particular man for the time being. I myself think that that contention is sound, but having regard to the state of the authorities I do not think I ought to give effect to that contention. My own view is that Parliament in using this language in 1842 meant by an office a substantive thing that existed apart from the holder of the office. If I thought I was at liberty to take that view I should decide this case in favour of the appellants, but I do not think I ought to give effect to that view, because I think it is contrary to what was proceeded upon in substance in *Attorney-General v. Lancashire and Yorkshire Ry. Co.* (1) in 1864, and one ought not lightly to depart from a course of business proceeded upon in matters of this kind. It seems to me, so far as I can extract what happened in that case from the two different reports which differ even in respect of the names of the judges who delivered judgment, that it was taken as common ground both on the side of the railway company and on the side of the Crown that permanent officials of a clerical kind would be officers within Sch. (E) as opposed to mere labourers or

(1) 2 H. & C. 792; 10 L. T. 95.

weekly wage earners such as porters, engine drivers, and the like. I cannot help thinking that if the present case had arisen in 1864 it would have been conceded on both sides that this clerk must be dealt with under Sch. (E), and I presume that practice has continued ever since. Therefore thinking that I am following in substance what is an authority I dismiss this appeal.

Appeal dismissed.

Solicitor for Great Western Railway Co.: *A. G. Hubbard.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

R. F. S.

F. L. SMIDTH AND COMPANY v. F. GREENWOOD
(SURVEYOR OF TAXES.)

1920

June 4, 7.

Revenue—Income Tax—Trade exercised within United Kingdom—Assessment of non-resident Persons in Name of Branch—Income Tax Act, 1853 (16 & 17 Vict. c. 34), Sch. D.—Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 41—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 31.

By s. 31, sub-s. 2, of the Finance (No. 2) Act, 1915, "A non-resident person shall be chargeable in respect of any profits or gains arising, whether directly or indirectly, through or from any branch, factorship, agency, receivership, or management, and shall be so chargeable under s. 41 of the Income Tax Act, 1842, as amended by this section, in the name of the branch, factor, agent, receiver, or manager."

The appellants were a Danish firm resident in Copenhagen manufacturing and dealing in cement-making and other similar machinery which they exported all over the world. They had an office in London in charge of a qualified engineer who was their whole-time servant. He received inquiries for machinery such as the appellants could supply, sent to Denmark particulars of the work which the machinery was required to do, including samples of materials to be dealt with, and when the machinery was supplied he was available to give the English purchaser the benefit of his experience in erecting it. The contracts between the appellants and their customers were made in Copenhagen and the goods were shipped f.o.b. Copenhagen. The Commissioners held that the appellants exercised a trade within the United Kingdom and were assessable to income tax:—

Held, that the place where a trade was exercised was the place where the transactions forming the alleged business were closed, in the case of a

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selling business by the sale of the commodity, and the profit thereby realized, and that therefore the appellants exercised their trade in Denmark, and that they could not in respect of the same profits and gains exercise their trade elsewhere.

Held, further, that s. 31, sub-s. 2, of the Finance (No. 2) Act, 1915, did not bring into taxation profits made by non-residents from a trade not exercised in the United Kingdom, and that therefore the appellants could not be assessed through their London office as a "branch" upon the profits which the appellants made by trading with this country.

CASE stated by the Commissioners for the General Purposes of the Income Tax Acts for the division of St. Margaret and St. John in the County of Middlesex for the opinion of the High Court.

At a meeting of the Commissioners held on November 20, 1918, Messrs. F. L. Smidth & Co. (hereinafter called the appellants) appealed against assessments under Sch. D of the Income Tax Acts for the years ending April 5, 1916, 1917 and 1918 in the sum of 5000*l.* for each year made upon them as engineers carrying on business at 9, Bridge Street, Westminster.

The following facts were found or admitted :—

1. The business of F. L. Smidth & Co. was owned and carried on by two partners P. S. H. Larsen and E. A. Foss, both of whom were Danish subjects residing and carrying on business in Copenhagen. The business was that of manufacturers of and dealers in machinery for cement works, brick works, mortar works and mining industries. They supplied such machinery to America, Africa and India and other countries as well as to the United Kingdom. The partners individually had no residence in the United Kingdom, nor did they employ an agent or representative except as hereinafter stated.

2. The appellants rented an office as sub-tenants from a Mr. Nash at 9, Bridge Street, Westminster. The name of the firm was on the office door and in the Post Office Directory.

3. The appellants employed Mr. Sidney Greenwood Robinson as consulting engineer at their office at 9, Bridge Street, whose duty it was to discuss with prospective purchasers

as to their requirements, to inspect the site of any proposed installation of machinery, take samples of earth, etc., and report and forward the samples to the appellants at Copenhagen. The samples were tested in the firm's laboratory at Copenhagen and plans drawn up there.

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4. All further negotiations were conducted between the appellants at Copenhagen and the intending purchaser direct, and a draft contract was prepared. When the terms of the contract were settled two fair copies were made, one copy being signed by the intending purchaser in the United Kingdom and forwarded to the appellants at Copenhagen, sometimes through their office in London and sometimes direct, on receipt of which the appellants forwarded to the purchaser the other copy signed by them in Copenhagen.

5. Copies of contracts between the appellants and the British Portland Cement Manufacturers, Ltd., dated July, 1913, between the appellants and John Reddihough, dated February 16, 1916, and between the appellants and Thomas A. Ward, Ltd., dated April 12, 1918, which contracts were stated to be typical contracts, were placed before the Commissioners, and were annexed to and formed part of the case.

6. Each of those agreements was in the English language and was stated to be subject to English law, and contained the usual arbitration clause. In two of the agreements the consideration was required to be paid in English money.

7. In each of the agreements it was stipulated that delivery of the machinery was to be made f.o.b. at Copenhagen.

8. The provisions of the contracts with regard to payment of the consideration money had not always been strictly followed. Sometimes bills of exchange or drafts were sent direct to the appellants at Copenhagen and sometimes to their office in London, in which latter case they were received by Mr. Robinson, who forwarded the same direct to the appellants at Copenhagen, but since the war the drafts had been paid into Lloyds Bank as agents for

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SMIDTH & appellants' account at the latter bank in Copenhagen.
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9. Owing to abnormal conditions occasioned by the war the appellants had in certain cases purchased in the United Kingdom parts of machinery, such as steel balls, flints, etc., necessary to complete the installation of or to carry out repairs to customers in this country.

10. Forms requiring a return of profits under Sch. D of the Income Tax Acts were served upon the appellants by being sent to them at their office in London and were forwarded to and received by them in Denmark and there completed by the appellants. The appellants admitted liability as regards profits, on the purchase and resale of goods in the United Kingdom as mentioned in the preceding paragraph—namely, year 1915–16 130*l.*, year 1916–17 107*l.*

11. Mr. Robinson gave evidence confirming the above facts. He stated that (a) he had been in the employment of the appellants since 1901. (b) The principal business of the appellants was the manufacture and supply of machinery for making cement, and their products were supplied to manufacturers of cement all over the world. (c) He did not act for the appellants in any other capacity than as engineer. (d) He had no authority to quote prices except on receiving instructions from the appellants at Copenhagen, nor had he authority to settle the terms of or to conclude or sign a contract, and except in the small cases mentioned in para. 9 he had not done so. (e) No price lists or catalogues were issued by the appellants in the United Kingdom or kept in the London office. (f) No advertisement appeared in any of the trade papers in the United Kingdom. (g) Prospective buyers were often invited to go to Copenhagen and sometimes with him in order to discuss terms of contracts with the appellants and their experts in Copenhagen. (h) All tests of samples were made in Copenhagen. (i) Prior to 1901 it was the custom of a senior employee of the appellants to come to England every two or three months in order to negotiate with intending purchasers, and the partners regularly visited this country

before the war every three or four months, sometimes stopping in London on their way to and from Denmark and New York, and when in London the partners would interview prospective purchasers, but terms were only generally discussed, and were finally agreed in Copenhagen. Neither of the partners had been in London or the United Kingdom since the war. (j) It was decided by the appellants in 1901 that business in this country would be facilitated and increased by their having a resident engineer to act as a "go between" between buyer and manufacturers in connection with technical matters. (k) The business of the appellants in the United Kingdom and also elsewhere had increased considerably since he (Mr. Robinson) had been appointed. Generally intending customers would apply direct to the firm in Copenhagen, but they might address an inquiry to him who would refer them to the firm in Copenhagen. (l) The appellants were sub-tenants of the offices at 9, Bridge Street, Westminster, their name being on the office door and also in the Post Office Directory as consulting engineers. (m) No books of accounts were kept in the United Kingdom. (n) Office expenses were paid out of an account kept with the London County Westminster and Parr's Bank solely for the purpose of paying such expenses, and a balance of 200*l.* to 300*l.* only was kept there, being supplied by remittances from Copenhagen. No other banking account was kept in the United Kingdom. (o) The remuneration of Mr. Robinson was by salary and bonus, the amount of the bonus depending not only on contracts in the United Kingdom but on the result of the appellants' trading. All the employees of the firm were employed on similar terms. (p) The appellants sometimes supplied a supervising engineer from Copenhagen at the purchaser's request and expense, but Mr. Robinson had the general oversight of the erection of all important installations of the appellants' machinery in the United Kingdom, and explained any difficulty the erectors might have in following the plans without further charge to the purchasers. (q) The counterparts of agreements were stamped with Danish stamp duty.

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Mr. Bremner on behalf of the appellants contended that no trade was exercised in the United Kingdom except as a result of the abnormal conditions brought about by the war by which the appellants were compelled to purchase in this country parts of machinery necessary to complete installations as herein stated. Also that there was no agent in the United Kingdom and never had been. Mr. Robinson was an employee of the firm, and was by trade a mechanical engineer, who had no authority either to negotiate or to conclude contracts with purchasers, he being only concerned with mechanical details. With regard to the agreements it was stipulated that delivery of the machinery was in all cases made f.o.b. at Copenhagen, and that except as stated there was no banking account in the United Kingdom. He referred to the case of *Grainger v. Gough* (1) and submitted that the essential facts in that and the present case were similar—namely, that contracts and delivery of the goods were made out of the United Kingdom, and that if the decision in the case quoted was followed it would not be held that the appellants exercised a trade within the United Kingdom. Counsel further contended that no profits and gains were received in this country, and that on this ground the assessments could not be sustained. He further contended that all the assessments were bad and not authorized by the Income Tax Acts, inasmuch as the firm was non-resident and could only be charged as provided by the Finance (No. 2) Act, 1915, s. 31, in the name of a branch, factor, agent, receiver or manager, and this had not been done.

The surveyor of taxes on behalf of the Crown contended (inter alia) that the appellants were liable to be assessed to Sch. D under the Income Tax Act, 1853, s. 2, and quoted the case of *Tischler v. Aphorpe* (2) and *Erichsen v. Last*. (3) He further contended that the appellants were rightly assessed within s. 31, sub-s. 2, of the Finance (No. 2) Act, 1915, in the name of their branch. He also contended that the appellants'

(1) [1896] A. C. 325.

(2) (1885) 2 Tax Cas. 89; 52 L. T. 814.

(3) (1881) 8 Q. B. D. 414.

business constituted one whole, including (1.) the business mentioned in para. 9 hereof, and (2.) the installing and repairing of machinery in this country, and that part of such business constituting one whole was carried on in this country.

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Mr. Bremner in reply contended that the case of *Tischler v. Aphorpe* (1) was distinguishable from the present one for the reason that Mr. Tischler resided in London for a sufficient length of time to enable notice of assessment to be served upon him, and had been actually so served, whereas the partners in the appellants' firm had not been served with notices; that in the case of *Erichsen v. Last* (2) the agent in that case had a larger staff under him and contracts were made in the United Kingdom and money paid in the United Kingdom. On the question as to where the contract was made he pointed out that the appellants did not sign the contract until they had received at Copenhagen the purchaser's part duly signed, and he submitted that for that reason the contract must be held to be made at Copenhagen. As regards the Finance (No. 2) Act, 1915, s. 31, he contended that that section was merely a machinery section, and that the appellants were not liable unless they exercised a trade within the United Kingdom.

The Commissioners after considering the facts and arguments of the parties were of opinion that a trade was exercised by the appellants within the United Kingdom and that the contentions of the surveyor were right, and they dismissed the appeal.

Sir W. Finlay K.C. and *Bremner* for the appellants. The decision of the Commissioners was wrong. The appellants trade with the United Kingdom but they do not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts, inasmuch as all contracts for the sale of and all deliveries of the appellants' machinery and plant to customers are at Copenhagen. The case falls exactly within the decision of the House of Lords in *Grainger*

(1) 2 Tax Cas. 89; 52 L.T. 814.

(2) 8 Q. B. D. 414.

1920 v. *Gough*. (1) The fact that the appellants have an office in
 SMITH & Co. v. GREENWOOD. London will not distinguish the present case from that case,
 because the office is merely used by the appellants' servant
 in order to be ready to give advice to intending customers
 and to transmit offers to purchase to the appellants in Copen-
 hagen, the contracts in every case being made abroad. The
 test whether a trade is carried on in the United Kingdom
 was stated by Brett L.J. in *Erichsen v. Last* (2) as follows :
 "wherever profitable contracts are habitually made in
 England, by or for foreigners, with persons in England,
 because they are in England, to do something for or supply
 something to those persons, such foreigners are exercising
 a profitable trade in England, even though everything to
 be done by them in order to fulfil the contract is done
 abroad," and by Cotton L.J. in the same case: "when a person
 habitually does and contracts to do a thing capable of pro-
 ducing profit, and for the purpose of producing profit, he
 carries on a trade or business." Those tests are not satisfied
 in the present case, the contracts for the sale of the appellants'
 plant being made abroad, and the whole of the profit-making
 work being done abroad. Sect. 31, sub-s. 2, of the Finance
 (No. 2) Act, 1915, merely alters s. 41 of the Income Tax
 Act, 1842, with regard to the machinery for assessing and
 collecting the tax; it does not extend the ambit of the
 charging section. There must be the exercise of a trade in
 the United Kingdom by a non-resident before he can be
 made chargeable. In the present case there has been no
 exercise of a trade in the United Kingdom by the appellants
 and therefore they are not chargeable.

Sir Gordon Hewart A.-G. and *R. P. Hills* for the respondent.
 There was ample material upon which the Commissioners
 could come to a conclusion of fact that the appellants are
 carrying on a trade or business in the United Kingdom.
 The contracts between the appellants and their customers
 in England were made in two parts, one of which was signed
 in England, the purchaser being bound as soon as it was so
 signed; the contracts were expressed to be made subject to

(1) [1896] A. C. 325.

(2) 8 Q. B. D. 418, 420.

English law, and in two cases payment was to be made in English currency. The office which the appellants have in London at which they maintain a resident engineer and a staff of clerks constitute a branch of the appellants.

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[ROWLATT J. The appellants in *Erichsen v. Last* (1) had a branch in this country, but stress was laid upon the fact that the contracts for the transmission of messages were made here.]

It was not said in that case that the contracts were made in this country. It is not essential in the present case that the contracts should have been made in this country in order that the respondent should succeed. There is a great distinction between the present case and *Grainger v. Gough*. (2) In that case Grainger was an independent contractor. It does not follow because the appellants are carrying on business in this country that they are not also carrying on business in Copenhagen. This is a very different case from that of *Mitchell v. Egyptian Hotels* (3), where the hotel company had altered their article of association and provided that the Egyptian business should be managed exclusively by a local board in Egypt. Sankey J. held in *Weiss, Biheller & Brooks v. Farmer* (4) that the question whether the appellants traded in England was mainly one of fact, and that they were not entitled to succeed unless there was no evidence upon which the Commissioners could have come to their determination. In *Werle & Co. v. Colquhoun* (5) it was held that the appellants, a firm of wine merchants at Rheims, exercised a trade within the United Kingdom. Stress was laid by Lord Esher upon the fact that the appellants authorized their agent to put their names in the London Directory. The position of Mr. Robinson in the present case was much more than that of a canvasser; he helped to get and to carry out the contracts. Even if there was no evidence to support the finding that the appellants carried on a business in the United Kingdom

(1) 8 Q. B. D. 414.

(3) [1915] A. C. 1022.

(2) [1896] A. C. 325.

(4) [1918] 2 K. B. 725.

(5) (1888) 20 Q. B. D. 753.

1920 they would still be liable under s. 31, sub-s. 2, of the Act of
 SMIDTH & 1915 in the name of their branch.
 Co. *Sir W. Finlay K.C.* in reply. It was pointed out by
 v. *Cockburn C.J.* in *Sulley v. Attorney-General* (1) that wherever
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 dealings must extend over various places; he buys in one
 place and sells in another. But he has one principal place
 in which he may be said to trade—namely, where his profits
 come home to him. That is where he exercises his trade,
 and that if a man were liable to income tax in every country
 in which his agents are established it would lead to great
 injustice. The appellants admittedly carry on business in
 Copenhagen from which place they send machinery all over
 the world. In *Werle & Co. v. Colquhoun* (2) the contracts
 were made in this country by the appellants' agent. The
 fact that the appellants had an office in London does not
 attract liability to the tax any more than the employment
 of travellers attract liability.

Cur. adv. vult.

June 25. ROWLATT J. read the following judgment
 In this case the main question is whether the appellants,
 who are a Danish firm manufacturing and dealing in cement
 making and other similar machinery which they export all
 over the world, are assessable to income tax in respect of a
 trade exercised in the United Kingdom. The facts may be
 very shortly summarized. The appellants are resident in
 Copenhagen, but they have an office in London in charge
 of a representative with engineering qualifications who is
 their whole-time servant. He receives inquiries for machinery
 such as the appellants can supply, sends to Denmark particulars
 of the work which the machinery is required to do including
 samples of materials to be dealt with, and when the machinery
 is supplied he is available to give the English purchasers
 the benefit of his experience in erecting it. The contracts,
 however, between the appellants and their customers are
 made in Copenhagen and the goods are shipped f.o.b. Under

(1) (1860) 5 H. & N. 711.

(2) (1888) 20 Q. B. D. 753.

these circumstances the Commissioners have held that the appellants exercised a trade within the United Kingdom, and it is contended on behalf of the Crown that the acts done by or on behalf of the appellants in the United Kingdom together with their maintenance of an office and representative here is evidence sufficient to justify that finding.

It seems to me that in these cases the question is whether the trade which it is sought to tax is exercised in the United Kingdom or outside of it in the sense that it is supposed to have a single situation, and the question is what that situation is. I do not think the exercise of a trade as mentioned in Sch. D can be said to be in the United Kingdom with the reservation that it may also take place outside of it. The scheme of this part of the income tax is to tax a foreign resident in respect of a source of income in the United Kingdom. The exercise of a trade produces a profit once but not twice, and if that exercise takes place in the United Kingdom it cannot, as the source of the same profits and gains, also take place elsewhere. The question in this case is therefore between the United Kingdom to the exclusion of Denmark and Denmark to the exclusion of the United Kingdom.

Upon the argument the principal cases cited were the well-known decisions of *Sulley v. Attorney-General* (1), *Erichsen v. Last* (2) and *Grainger v. Gough*. (3) In the first-named an American firm had a buying branch in England, through which goods were purchased which were sold abroad and profit thereby secured. It was held that they did not exercise a trade within the United Kingdom. In *Erichsen v. Last* (2) a telegraph company possessing a world-wide system of cables offered at its offices in this country the means of telegraphic communication with the rest of the world and, for the services so rendered here, was paid here under contracts made here. It was held that it did exercise a trade in the United Kingdom. *Grainger v. Gough* (3) was the well-known case of a foreign champagne grower and merchant. He was repre-

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sented in this country by a firm who were not his servants but independent agents, and they merely obtained and transmitted to him offers for his goods which he accepted or declined abroad. It was held that he did not exercise a trade in this country through such agents. The facts in none of these cases present any close resemblance to the present. In particular in *Grainger v. Gough* (1) there was no branch establishment of the foreign trader in the United Kingdom, and it was a question of treating a commission agent whose functions were practically limited to solicitation as a person exercising a trade on behalf of a foreign principal. But I cannot read the judgments in those cases without being driven to the conclusion, notwithstanding some remarks of the Master of the Rolls in *Erichsen v. Last* (2), that the real place where the trade is exercised is the place where the transactions forming the alleged business are closed, in the case of a selling business, by the sale of the commodity and the profit thereby realized. It seems to me that is a clear and definite principle. Until the sale is effected the trade is incomplete. Trading is buying or making and selling, and if I am right in supposing that one single place has to be treated as the place where the trade is exercised it seems to me that it must be where the profit-bearing transactions are closed. After all, this is a much more satisfactory principle than to leave it as a question of fact in each case whether there has been a sufficient volume of activity in connection with the business in any particular place to afford evidence to support a finding that the trade was exercised there.

A further point was taken by the Attorney-General though not very elaborately argued. It was that the effect of s. 31, sub-s. 2, of the Finance (No. 2) Act, 1915, was to make the profits which the appellants make by trading with this country assessable because such profits were made directly or indirectly through their London office, which it was said is a "branch" within the meaning of the sub-section. The scope of this sub-section is not very clear, but I am not prepared to hold that its effect is to bring into taxation profits

(1) [1896] A. C. 325.

(2) 8 Q. B. D. 414.

made by non-residents from a trade not exercised in the United Kingdom. To make an extension in the scheme of taxation of that magnitude and importance the Court is entitled to look for words of clear and direct enactment.

In the result the appeal is allowed with costs.

Appeal allowed.

Solicitors for appellants : *Wainwright, Pollock & Co.*

Solicitor for respondent : *Solicitor of Inland Revenue.*

R. F. S.

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June 7.

Revenue—Excess Profits Duty—Trade or Business—Change of Ownership—Liability of Owners for Duty in respect of Profits made by Predecessors—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 38 ; s. 45, sub-s. 2.

Sect. 38, sub-s. 1, of the Finance (No. 2) Act, 1915, provides that a duty, known as the "excess profits duty," shall be charged, levied and paid on the amount by which the profits arising from any trade or business to which Part III. of the Act applies, in any accounting period which ended after August 4, 1914, and before July 1, 1915, exceeded by more than 200% the pre-war standard of profits.

Sub-s. 2 provides that the accounting period shall be taken to be the period for which the accounts of the trade or business have been made up, and where the accounts have not been made up for any definite period, or for the period for which they have been usually made up, or a year or more has elapsed without accounts being made up, shall be taken to be such period not being less than six months or more than a year ending on such a date as the Commissioners of Inland Revenue may determine.

By s. 45, sub-s. 2 : "The duty may be assessed on any person for the time being owning or carrying on the trade or business or acting as agent for that person in carrying on the trade or business, or, where a trade or business has ceased, on the person who owned or carried on the trade or business or acted as agent in carrying on the trade or business immediately before the time at which the trade or business ceased, and where there has been a change of ownership of the trade or business, the Commissioners of Inland Revenue may, if they think fit, take the accounting period as the period ending on the date on which the ownership

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has so changed and assess the duty on the person who owned or carried on the trade or business or acted as agent for the person carrying on the trade or business at that date."

A company owning a business was wound up voluntarily, its business and all its assets being sold to a new company as from December 31, 1914. The new company, which was incorporated on December 28, 1914, was in September, 1916, assessed to excess profits duty under s. 45 of the Finance (No. 2) Act, 1915, in respect of the profits made by the company which had been wound up during the accounting periods August 31, 1913, to August 31, 1914, and from August 31, 1914, to December 31, 1914. The company appealed against the assessment:—

Held, allowing the appeal, that the persons to be assessed to excess profits duty under s. 45, sub-s. 2, of the Finance (No. 2) Act, 1915, were the persons who owned the trade or business during the accounting period, even though there had been a change of ownership at the end of an accounting period, but that if there had been a change of ownership in the middle of the accounting period without the accounts having been made up the Commissioners might if they thought fit take the date of the change as being the end of an accounting period and assess the person who owned the business at the date of the change in respect of the period prior to the change.

CASE stated by the Commissioners for the General Purposes of the Income Tax Acts for the City of London under s. 45, sub-s. 5, of the Finance (No. 2) Act, 1915, and s. 59 of the Taxes Management Act, 1880, for the opinion of the High Court.

At a meeting of the Commissioners held on January 28, 1919, the Wankie Colliery Co., Ltd. (hereinafter called "the company"), appealed against assessments made upon them to excess profits duty by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act, 1915, Part III., as follows:—

Accounting period, August 31, 1913, to August 31, 1914, net amount of excess profits, 22,000*l*. Rate 50 per cent. Duty payable, 11,000*l*.

Accounting period, August 31, 1914, to December 31, 1914, net amount of excess profits, 8333*l*. Rate 60 per cent. Duty payable, 5000*l*.

The company was incorporated under the Companies Acts, 1908 and 1913, on December 28, 1914, with a capital of 410,000*l*., divided into 820,000 shares of ten shillings each.

The objects for which the company was established included

the following : "to purchase certain coal bearing properties in Rhodesia, South Africa, and the business of the Wankie Colliery Co., Ltd. (incorporated in 1909), carried on there as a going concern, and for this purpose to enter into and carry into effect with or without modification an agreement made between the Wankie Colliery Co., Ltd. (incorporated in 1909), and Alfred Wilson Bird its liquidator of the one part and the company of the other part in the terms of the draft, a copy whereof has for the purpose of identification been subscribed by George Stanley Pott, a solicitor of the Supreme Court."

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By an agreement dated December 30, 1914, and made between the Wankie Colliery Co., Ltd. (incorporated in 1909, and therein and hereinafter referred to as "the old company"), and Alfred Wilson Bird the liquidator thereof of the one part and the company of the other part (being the agreement mentioned in the preceding paragraph) after reciting that by special resolutions of the old company passed and confirmed at extraordinary general meetings thereof held respectively December 8 and 23, 1914, it was resolved—(1.) that it was desirable to reconstruct the old company and accordingly that the old company be wound up voluntarily and that the said Alfred Wilson Bird should be and he was thereby appointed liquidator for the purpose of such winding up and that the said liquidator be and he was thereby authorized to divide all or any of the assets of the company amongst the members in specie and to exercise all or any of his powers by attorney including a power to sub-delegate. (2.) That the said liquidator should be and he was thereby authorized to consent to the registration of a new company to be named "Wankie Colliery Co., Ltd." (or some similar name), with a memorandum and articles of association as therein mentioned. (3.) That the draft resolution in the agreement referred to (being the draft of these presents) should be and the same was thereby approved and that the said liquidator should be and he was thereby authorized pursuant to s. 192 of the Companies (Consolidation) Act, 1908, to enter into an agreement with such new company (when incorporated) in the terms of the said draft and to carry the same into

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effect with such (if any) modification as he might think expedient, it was agreed (inter alia) as follows:—

“(1.) The old company and its liquidator shall transfer and the new company shall take over all and singular the colliery, mining property, lands, grants, buildings, goods, chattels, moneys (except as hereinafter mentioned), credits, debts, bills, notes and things in action of the old company and the undertaking and business thereof with the full benefit of all contracts and engagements and of all securities in respect of the said things in action to which the old company is entitled and all the other real and personal property of the old company whatsoever and wheresoever as on the 31st day of December, 1914.

“(2.) As part of the consideration for the said transfer the new company shall undertake, pay, satisfy and discharge all the debts, liabilities and obligations of the old company whatsoever and shall adopt, perform and fulfil all contracts and engagements now binding on it and shall at all times keep the old company and its liquidator and contributories indemnified against such debts, liabilities, obligations, contracts and engagements and against all actions, proceedings, costs, damages, claims and demands in respect thereof.

“(3.) As further part of the consideration for the said transfer the new company shall pay and at all times hereafter keep the old company and its liquidator and contributors indemnified against all costs and expenses of and incident to the winding up of the old company and of carrying the said transfer into effect. The liquidator shall nevertheless out of the moneys of the old company pay off and redeem 7000*l.* of the debentures of the old company which have been drawn for redemption and are payable on December 31, 1914, and all interest due on the outstanding debentures and also retain a sum of 20,261*l.* 13*s.* out of the assets for distribution amongst the members of the old company.

“(4.) As further part of the consideration for the said transfer the new company shall allot and issue to each debenture holder of the old company one debenture of the new company of 100*l.* in respect of each debenture of the

old company of 100*l.* held by him or her on the footing that the same shall be accepted in full satisfaction of such debentures and that such debentures shall be surrendered to the new company in accordance with the provisions of the agreement dated November 24, 1914, and made between the Fanti Consolidated Mines, *Ld.*, on behalf of itself and all other the holders of the debentures of the old company of the one part and the old company of the other part. The debentures of the new company to be issued as aforesaid are to belong to a series of 93,000*l.* like debentures which are to be in the same form and secured by a trust deed framed in the terms of the drafts which for the purpose of identification have been subscribed by George Stanley Pott, a solicitor of the Supreme Court.

“(5.) As the residue of the consideration for the said transfer the new company shall allot to the liquidator of the old company or his nominees 810,446 fully paid shares of ten shillings each of the new company to the intent that the same may be distributed amongst the members of the old company in the proportion of two fully paid shares in the new company in respect of each fully paid share held by them in the old company.”

On January 1, 1915, the company received the certificate of the Registrar of Companies entitling them to commence business.

The consideration for the transfer of the assets and the undertaking of the old company set out in clause 1 of the agreement of December 30, 1914, was duly paid and distributed among the persons entitled under the provisions of the said agreement, the terms of which were fully carried out. The final meeting of the old company under s. 195 of the Companies (Consolidation) Act, 1908, was held on October 14, 1915. The final return of the old company was filed on October 18, 1915.

The Finance (No. 2) Act, 1915, received the Royal assent on December 23, 1915. The assessments in question were made on September 5, 1916.

The company contended that under the circumstances

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aforesaid they could not be made liable for excess profits duty in respect of profits which arose before they were incorporated and which were the property of and had been distributed by a company which had been fully wound up before the charging Act was passed. They further contended that the present company was in law a separate entity from the old company and that "the person for the time being owning or carrying on the trade or business" in s. 45, sub-s. 2, of the Finance (No. 2) Act, 1915 (being the person upon whom the duty might be assessed), meant the owner in the years to which the assessments refer. The case of *Cannon Brewery Co. v. Gas Light and Coke Co.* (1) was cited.

On behalf of the Commissioners of Inland Revenue it was contended that the assessments in question made upon the company were correctly made.

The Commissioners who heard the appeal were of opinion that the contentions of the Commissioners of Inland Revenue were correct and confirmed the assessments.

Sir John Simon K.C. and *Latter* for the appellants. The question in this case is whether the owner of a trade or business is liable to be assessed to excess profits duty in respect of profits made by his predecessors. It turns upon the meaning of the words "The duty may be assessed on any person for the time being owning or carrying on the trade or business" in s. 45, sub-s. 2, of the Finance (No. 2) Act, 1915. The point was referred to but not decided in *Robbins v. Inland Revenue Commissioners* (2) and *Inland Revenue Commissioners v. Gittus*. (3). Under s. 38 of the Act of 1915 the duty is levied in respect of the amount by which the profits arising from any trade or business in any accounting period exceed the pre-war standard of profits. The words "for the time being" in s. 45, sub-s. 2, mean "for the time to which the assessment relates," and not as the Crown contend "for the time of assessment." It is only the persons who owned the trade or business during the

(1) [1904] A. C. 331.

(2) [1920] 1 K. B. 51.

(3) [1920] 1 K. B. 563.

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accounting period who are liable to pay the duty. Sub-s. 2 of s. 45 provides for the assessment of the duty in three cases which must be distinguished, first, on any person for the time being owning or carrying on the trade or business; secondly, where a trade or business has ceased, on the person who owned or carried on the trade or business immediately before it ceased; thirdly, where there has been a change of ownership of the trade or business, the Commissioners may take the accounting period as the period ending on the date on which the ownership changed and assess the duty on the person who owned or carried on the trade or business at that date. This last provision would be quite unnecessary if the contention of the Crown is correct, whereas it is quite consistent with the appellants' contention. Where a statute is ambiguous and possible of two constructions that construction ought not to be given to it which will make persons liable to pay duty in respect of profits which they have not received. Provision is made in sub-s. 4 for the case of a company being wound up after the commencement of the Act, the liquidator being required to set aside out of the assets of the company sufficient to provide for any excess profits duty. There is nothing in s. 45 to qualify the proposition that the person who is liable to pay excess profits duty is the person who owned the business during the accounting period and made the profits. If it had been intended to make a person liable to pay the duty other than the person who had made the profits it would have been expressly so provided.

R. P. Hills (*Sir Gordon Hewart A.-G.* with him) for the Crown. The appellants were rightly assessed to excess profits duty in respect of the profits of their predecessors. It is clear that the Act was intended to have a retrospective effect because it was the express object of the statute that a person who made profits after August 30, 1913, exceeding the pre-war standard of profits should be liable for the tax under an Act which was not passed till December 23, 1915, two years afterwards. A very long time necessarily elapsed before the assessments to the duty could be made during which time the owners of the businesses might change. The excess profits

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duty is primarily laid on trades and businesses and not on persons. The only provision which deals with the person to be assessed is contained in s. 45, sub-s. 2. All the provisions of the statute point to the conclusion that it is the business and not the person which is being charged and that the trade or business the subject of the charge is regarded as a continuous entity. The first limb of sub-s. 2 of s. 45 is wide enough to cover the present case. The last limb of the sub-section with reference to a change of ownership of a trade or business is conclusive in favour of the Crown's contention.

[ROWLATT J. That provides for an apportionment if there is a change of ownership during an accounting period.]

It does more than that. If a change of ownership is made at the end of an accounting period there is no need of an apportionment, but the Commissioners may, if they think fit, make an assessment on the person who was the owner at that time. The fact that the Commissioners are given an option shows that they have the power if they think fit to make the assessment upon the person owning the business at the time of the assessment. The third limb of the sub-section is meaningless if the appellants' contention is correct. Inasmuch as the duty was made retrospective it must necessarily involve hardship in particular cases. The fact that Parliament thought it necessary to insert a provision in s. 38, sub-s. 2 (a), of the Finance Act, 1918, for the protection of a purchaser of stock from the liquidator of a business which has ceased to be carried on supports the Crown's present contention.

ROWLATT J. I think this appeal must succeed. This point has been referred to but not decided in judgments which have been given by myself and by the Court of Appeal, but now it has to be decided.

The excess profits duty is imposed by s. 38 of the Finance (No. 2) Act, 1915. The section provides that "there shall be charged, levied and paid on the amount by which the profits arising from any trade or business to which this Part of this

Act applies, in any accounting period exceeded the pre-war standard of profits a duty." That is the charging section and prima facie the taxpayer in respect of the tax so charged is the person who owns or owned, because it is a retrospective tax, the thing charged. There can be no doubt about that being the prima facie scope of the tax. But a question arises under s. 45, which is I think a machinery section, because of the words "for the time being" in that section.

In the present case the facts are these: A company owned a business and the first accounting period that was relevant ended on August 31, 1914. The company sold its business as from December 31, 1914, to the appellant company, and the accounts were made up, and therefore another accounting period came into existence for the last four months of 1914. In respect of those two periods the purchasing company was assessed to excess profits duty some two years later, and according to the contention of the Crown, might have been assessed even if there had been several intervening purchasers.

I do not think that there is anything in s. 45, sub-s. 2, of the Finance (No. 2) Act, 1915, which so extraordinarily extends the nature of the tax as to make one man pay duty on the profits which another man has made. If s. 45 is read from the point of view that the Act is taxing the recipient of the profits taxed I think it will be found that the section can be read perfectly well giving ample scope to the words "for the time being," without giving them the extraordinarily wide effect that it is said they have. The section provides that "the duty may be assessed on any person for the time being owning or carrying on the trade or business or acting as agent for that person." That I think deals with the general position where no difficulty arises, and it simply says that where a trade or business is being carried on the owner or his agent may be taxed. The next limb of the section deals with a case where a business has ceased to be carried on, and it says that in that case the person who owned the business or the agent of the owner when it was being carried on may be taxed.

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The third limb of the section deals with the case of a business changing hands, and it seems to me that in that case the section recognizes perfectly well that where a business has changed hands the person to pay the tax is the owner of the business before it changed hands in respect of the time before it did change hands. The option that is given to the Commissioners of Inland Revenue is an option which is necessary where there has been a change of ownership without the accounts having been made up, so that there is no accounting period, and in that case there has to be an artificial accounting period made by the Revenue. The section says that where there has been a change in the ownership of a business the Commissioners may take the date of the change as the end of an accounting period if they like, and assess the person who owned the business at that date in respect of that accounting period. But where there is no necessity for the Commissioners to make an artificial end of an accounting period, it seems to me that they must assess the person who owned the business in respect of the accounting period when he did own it. I ought perhaps to add this. It seems to me that it is within the scheme of s. 45 that if there is a change of ownership during an accounting period, the Commissioners need not introduce a new accounting period at the date of the change, but can assess the tax for the one period leaving it to be adjusted between the parties as in the common case of Sch. (A), or rates, or charges for water. The appeal must be allowed.

Appeal allowed.

Solicitors for appellants : *Holmes, Son & Pott.*

Solicitor for Crown : *Solicitor of Inland Revenue.*

R. F. S.

[IN THE COURT OF APPEAL.]

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PHILLIPS v. KERSHAW, LEESÉ AND COMPANY.

Employer and Workman—Compensation—Death of Dependant before Award—Principle of Assessment—“Reasonable and proportionate to the injury to the dependants”—Workmen’s Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1; Sch. I. (1.) (a) (ii.).

A workman died from the effects of an accident while in the employ of the respondents, and his dependants thereby became entitled to compensation under the Act. He had two dependants, his widow and a daughter aged thirteen. The widow died within four weeks of her husband’s death. The claim was made on the footing of partial dependency. The widow having died before the making of any award, the proceedings were continued by her executrix. The wages of the deceased workman were 3*l.* a week, and the county court judge awarded the sum of 250*l.*, of which 20*l.* was apportioned to the infant daughter and 230*l.* to the executrix. The employers appealed on the ground that the compensation was not assessed on the basis of a sum “reasonable and proportionate to the injury to the dependants,” as required by Sch. I. (1.) (a) (ii.), of the Act; and that the county court judge ought to have taken into consideration the fact that the widow died within four weeks of her husband’s death:—

Held, that the widow having died before the assessment of compensation no speculation as to the expectation of life was necessary, the facts were ascertained, the injury was ascertained, and that injury alone was what had to be considered in assessing the compensation.

Dictum of Lord Macnaghten in *United Collieries v. Simpson* [1909] A. C. 383, 392, approved and applied.

APPEAL from an award of the judge of the Stockport County Court sitting as arbitrator under the Workmen’s Compensation Act, 1906.

The applicants were Agnes Phillips daughter and legal personal representative of Charlotte Bailey deceased, the widow of John Henry Bailey a deceased workman, and Lily Bailey his infant daughter, suing by the said Agnes Phillips her next friend.

John Henry Bailey was injured by an accident arising out of and in the course of his employment with the respondents, and died from his injuries on March 22, 1919. At the time of his death his wife Charlotte Bailey was suffering from influenza. Her illness coupled with the shock of her husband’s

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death resulted in her own death on April 18, 1919. On March 28, 1919, she had made a claim for compensation on behalf of herself and her daughter Lily, who was thirteen years of age. After her death the proceedings were continued by Agnes Phillips, her daughter by a former husband, as her legal personal representative.

The county court judge found that Charlotte Bailey (since deceased), wife of John Henry Bailey, and Lily Bailey his infant daughter, were partially dependent on his earnings at the time of his death, and that he left no other dependants.

The judge ordered that the respondents do pay the sum of 250*l.* to the dependants, and that the said sum of 250*l.* be apportioned between Lily Bailey and Agnes Phillips, as legal personal representative of Charlotte Bailey the widow, and he apportioned the sum of 20*l.* to or for the benefit of Lily Bailey, and the sum of 230*l.* to Agnes Phillips as legal personal representative of Charlotte Bailey. Against this award the respondents appealed on the grounds:—

1. That the learned county court judge was wrong in law, and misdirected himself in not assessing the compensation on the basis provided by the Act.

2. That he was wrong in law, and misdirected himself in not assessing the compensation on the basis of a sum reasonable and proportionate to the injury to the dependants.

3. That he was wrong in law, and misdirected himself in not taking into consideration the fact that the widow died within four weeks of the accident to and death of the workman.

Wingate Saul K.C. and *Eastham* for the appellants. This is a case of partial dependency. In the case of total dependency the Act itself fixes the amount of the compensation. In the case of partial dependency the compensation must be “reasonable and proportionate to the injury to the dependants”: Workmen’s Compensation Act, 1906, Sch. I. (1.) (a) (ii.). We rely upon the dictum of Lord Macnaghten in *United Collieries v. Simpson*. (1)

[They were stopped.]

(1) [1909] A. C. 383, 392.

E. C. Burgis for the respondents. It is said that the only measure of the employer's liability in such a case as this is the expectation of life of the dependant. The appellants seek to establish that as a new basis of calculation. The dependant has a right to the reasonable compensation which accrued at the date of the accident. The injury is not only the loss of enjoyment of support from the deceased workman : it is measured by what the workman was worth to the dependant. He would have supported the widow during his working life. The extent of the injury is to be ascertained at the date of his death. Lord Loreburn said in *United Collieries v. Simpson* (1) : " As Lord Mackenzie says, it " (the amount of compensation) " is not calculated with reference to the expectation of life of the dependant. In cases of partial dependence the amount of compensation is discretionary, subject to a maximum, but is not proportioned to the expectation of life."

[LORD STERNDALE M.R. It must be proportionate to the injury sustained.]

Here the amount of the compensation must be assessed as at the death of the workman, and that amount accrued to the widow's estate.

LORD STERNDALE M.R. I think it is clear the award cannot stand. A workman was killed, or his death resulted, from a cause which entitled the dependants to compensation under the Workmen's Compensation Act. He had two dependants, his widow and a daughter of thirteen. At the time of his death the widow was seriously ill from influenza, and either through the influenza alone or the influenza coupled with the shock of his death, she died within somewhat less than four weeks of the death of her husband.

The case came before the learned county court judge for the assessment of compensation, and it was agreed that the deceased man's wages were a little over 3*l.* a week. On that the learned county court judge had to assess compensation. Sch. I. (1.) (i.) of the Workmen's Compensation

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(1) [1909] A. C. 389.

C. A. Act, 1906, provides that "If the workman leaves any
 1920 dependants wholly dependent upon his earnings, a sum
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 v. during the three years next preceding the injury, or the sum
 KERSHAW, of 150*l.*, whichever of those sums is the larger, but not
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 Co. weekly payments made under this Act, and any lump sum
 Lord Sterndale paid in redemption thereof, shall be deducted"—that did not
 M.R. arise here. Then (ii.): "If the workman does not leave
 any such dependants"—that is, dependants wholly dependent
 —"but leaves any dependants in part dependent upon his
 earnings, such sum, not exceeding in any case the amount
 payable under the foregoing provisions, as may be agreed
 upon, or, in default of agreement, may be determined, on
 arbitration under this Act, to be reasonable and proportionate
 to the injury to the said dependants."

The claim was made upon the footing of partial dependency, and the evidence before the learned county court judge certainly points to partial dependency, because it was proved that a brother used to pay the widow 37*s.* a week, and she used to give him 7*s.* back, leaving a balance of 30*s.* for the widow. There is no evidence as to what part of that 30*s.* it was necessary to spend for his keep, and upon the evidence before us, as shown by the county court judge's notes, it was clearly a case of partial dependency.

The learned county court judge said: "The evidence really established a case of a total dependency (in my view) on the part of the widow of the deceased workman." As to that we do not know upon what material he made that statement, except that it is suggested, although it does not appear upon his notes at all, that he thought the whole of that 30*s.* was absorbed in the keep of the son: there is nothing to show one way or the other upon the notes. But he says the claim was only put forward upon the footing of partial dependency and no application to amend was made, and therefore he treated it as a case of partial dependency, and, having done that, he awarded a sum of 250*l.*

The claim on the part of the child was I am told 50*l.* That

was the outside claim made on her behalf as a dependant. The claim was a curious one: it was for Agnes Phillips, one moiety of 250*l.*—125*l.*; Lily Bailey, one moiety of 250*l.*—125*l.*; and Lily Bailey as a dependant 50*l.* The learned county court judge, the claim of Lily Bailey as a dependant being 50*l.* and 50*l.* only, awarded 250*l.*, and he did not in the judgment that he gave say anything at all about the amount that he awarded to Lily Bailey as a dependant: but we are told that afterwards it was agreed between the half sisters, that Lily Bailey as a dependant should have 20*l.* and that the other 230*l.* should be divided, and the award was drawn up to carry that out, at any rate to this extent, that 20*l.* was apportioned to Lily Bailey and 230*l.* to Agnes Phillips. That is the award. Supposing the outside award on behalf of Lily Bailey as a dependant to be 50*l.*, it is obvious that 200*l.* of this lump sum of 250*l.* must be awarded to the executrix. Can that be justified? In my opinion it cannot. The dependant the widow, to whose executrix it is awarded, died four weeks or less than four weeks after the death of the workman, and therefore the injury to the dependant the widow, to whose injury the sum awarded is to be apportioned, could not exceed the amount which she lost during those four weeks. Where the dependant is alive of course the county court judge is obviously put in great difficulty. He has to consider a number of things, and amongst them, how long the dependant is likely to suffer the injury or the deprivation of income from which the injury arises, and he takes that into consideration although he does not of course make the sum exactly proportionate to the expectation of life. But where before the compensation is assessed the dependant has died, it is no longer in the region of speculation, for the period of time for which she was deprived of the sum that she used to get from the workman is ascertained. That is clearly stated by Lord Macnaghten in *United Collieries v. Simpson* (1), although the decision in that case was upon another point. In discussing the question he says: "The employer is liable to make compensation in accordance with

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the First Schedule of the Act. The deceased leaves, I will suppose, a sole dependant wholly dependent on his earnings, a grandmother, it may be, on her deathbed, or a granddaughter engaged to be married to a man well able to support a wife. The grandmother dies, or the granddaughter is married before any claim for compensation is made. If the judgment under appeal stands, the married granddaughter or the personal representative of the grandmother, as the case may be, is entitled, by reason of the workman's death, to a considerable pecuniary benefit, wholly unexpected, and, some might think, wholly undeserved." That is dealing with the question of total dependency. "On the other hand, if this workman had left both a grandmother and a granddaughter in similar circumstances, but each only partially dependent on his earnings"—that is this case—"and the one married and the other died before a claim was made, or even after claim made, but before determination of the amount of compensation, it might be that neither the granddaughter nor the representative of the grandmother would be awarded one farthing." The representative of the grandmother in that case of course would not, if the grandmother had died and therefore there was no injury to her; the granddaughter who had married would not, because she had married a man who was able to keep her and she was not therefore dependent. That seems to me to show that in Lord Macnaghten's opinion, as I said, where the partial dependant has died before the assessment of compensation, there is no question of speculation, of considering the expectation of life or anything of that kind; the matter is beyond the region of speculation; the facts are ascertained and the injury is ascertained; and that injury alone is what is to be considered in arriving at the compensation.

The learned county court judge therefore, it seems to me, could not possibly be justified in awarding the sum of 200*l.* to the representative of the widow. I think the only right thing to do in this case is to send it back for reconsideration for this reason: Looking at the form of this claim and at the whole case, I think that the learned judge may have been

under a misunderstanding. He may have awarded the sum thinking that Lily Bailey would share in it beyond the amount apportioned to her as a dependant, and I think that, there being this misunderstanding and misapprehension about the matter, the right thing is to send the case back for reconsideration, with, of course, the direction that to award compensation to the representatives of a partial dependant upon anything approaching the sum proper as compensation to be awarded to the representative of a total dependant, is wrong, and that compensation can only be awarded in respect of the actual injury to the partial dependant.

It is suggested that it would be embarrassing to the learned county court judge to send this case back to him. In the case of new trials or retrials I am very much inclined to agree with that. It has always been my opinion that cases should not go back to the same judge; they should be retried by another judge, as is almost always done in the King's Bench Division. But this is not a case of that kind; this is not a retrial: it is only a sending back of the case for a reassessment of compensation which will have to be dealt with and administered in this learned judge's own county court. I do not think there is anything in the matter which will embarrass the learned county court judge, and I do not see any reason for not sending it back to him.

The appellant will of course have the costs of this appeal. The costs of the first hearing will depend upon the result of the second.

ATKIN L.J. I agree. Under s. 1 of the Workmen's Compensation Act the employer is liable to pay compensation in accordance with the First Schedule, under which, if the workman leaves any dependants in part dependent upon his earnings, the compensation is to be such sum as may be determined on arbitration to be reasonable and proportionate to the injury to the said dependants. Resting there, I think that gives a right to the partial dependant to have determined what the compensation is, but that the compensation so determined is, as provided for under the Act, to be an amount

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reasonable and proportionate to the injury to the said dependants. The injury to the partial dependants is the withdrawal of the support which the deceased workman was giving them, and the amount to be awarded proportionate to the injury must depend, amongst other things, upon the length of time during which that support would be forthcoming to the dependants. As to the measure of that compensation it would also be such as would be determined in the ordinary course by some estimate made by the judge of the length of time during which the particular applicant would have been dependent upon the workman if the workman had lived, and that is a matter of estimate or calculation in the county court. In the case of the children it varies with the age of the children; in the case of the widow it depends upon the age of the widow, possibly on the question whether she may remarry, and so on, and it is a matter that the county court judge has to estimate as best he can upon the evidence before him. But it sometimes happens that in a case of that kind the facts have been ascertained, and then the learned judge is relieved from guessing or estimating on the probabilities. He knows as a fact, and if he knows at the time he comes to measure out the compensation what the period of the support of the particular applicant would have been if the workman had lived, then he takes that into account; it is unnecessary, and indeed improper, to make any further calculation; it rests on the ascertained facts; and in this case as far as that is concerned, the learned judge knows what the injury done is, and that this man would not have had to support his wife, as it happened, more than four weeks. That therefore must be the period with reference to which the learned judge must measure the extent of the injury. It seems to me impossible to award the large sum that he has granted in this case. Therefore I think the award was arrived at upon an incorrect principle in that respect.

Then there comes the question of the daughter Lily. She is a girl of thirteen, and though it is true she had been earning at the time some wages, of course the learned judge would take into account the cost of clothing and

I suppose education, and possibly other things. From that point of view it is impossible in my opinion that the learned judge should only award the small sum of 20*l.*, which was the amount of his ultimate award. It is quite plain to my mind that the learned judge awarded that sum upon the footing that Lily would share in the mother's estate which the daughter Agnes recovers as her legal personal representative. I do not know, but it seems to have been thought that the amount would be divided in equal shares between the two daughters. I do not know how that was; it appears really that in law Lily would only have been entitled to one-third. It does not matter now because any large sum awarded to the representative of the mother disappears. It is obvious that the matter must be reconsidered by the judge having regard to the facts as to the mother's death, which he ought to have taken into account.

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There will be liberty for the applicants to make such application as they may think fit by way of amendment or otherwise with a view of putting the real case before the learned county court judge so that he may make the appropriate order upon it. I agree that the appeal should be allowed with costs and that the matter should be remitted to the learned county court judge.

YOUNGER L.J. I am of the same opinion. I cannot doubt that one of the main difficulties in connection with this case was occasioned by some sort of idea that the claim of the daughter Lily for compensation is in some manner affected by the fact that incidentally she happens to be one of the next of kin of her mother. If it had been made quite plain that the amount of compensation payable in respect of the widow is now receivable by her legal personal representative and is in no way dependent upon the ultimate destination of the sum so received, then I think a good deal of the difficulty that has occurred in this case would not have arisen.

As I understand it, the claim of the legal personal representative depends as to amount entirely upon whether the widow was totally or partially dependent upon the deceased

C. A. workman. Whether she was partially or totally dependent, what happens to the money after her legal personal representative has received it makes no difference to the assessment.

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Younger L.J.

I think the appeal ought to be allowed on the grounds stated by the other members of the Court.

Appeal allowed.

Solicitors for the appellants: *John Taylor & Co., Manchester.*

Solicitors for the respondents: *Maude & Tunnickiffe, for Brown, Briggs & Co., Stockport.*

G. A. S.

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18;
June 16.

[IN THE COURT OF APPEAL.]

In re FOSTER.

BARNATO *v.* FOSTER.

Solicitor—Costs—Mortgage—Mortgagee's Solicitor—Recital in Mortgage Deed of Amount of Costs due—Costs included in Mortgage Debt—Right of Mortgagee to Delivery of Bill of Costs.

In 1917 a son agreed to pay his mother's debts upon the security of a mortgage of certain life policies. He employed a solicitor to carry out the transaction and to prepare the mortgage deed, and he opened an account at a bank upon which the solicitor could draw to pay the debts. The son went abroad to serve with the army, appointing his wife and the solicitor his attorneys to act for him in the matter. The solicitor accordingly paid the debts and prepared the mortgage deed, giving a charge on the policies for the total sum paid. The items of which the total sum constituting the mortgage debt was made up appeared in the schedule to the deed. The deed contained a recital that the item of 914*l.* appearing in the schedule was "the ascertained and agreed amount of the costs and disbursements of" the lender's solicitor for the negotiations leading to and of and incidental to the indenture; and in the schedule, under date November 27, 1917, the 914*l.* was stated to be the lender's solicitor's costs for services mentioned in the recital. It appeared that on that date the solicitor drew a cheque payable to himself for this amount on the account at the bank, and so paid himself. The son was at that time

abroad and did not return until after the deed was executed by his attorneys. No bill of these costs was delivered. The solicitor was not a party to the mortgage deed. The son thereupon applied for delivery of a bill of costs. The mother did not join in the application. The solicitor opposed the application on the ground that the sum was not charged against the son, but was charged against the mother and had been approved and paid by her as mortgagor out of the money lent to her by the son as mortgagee:—

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Held, that the solicitor must be ordered to deliver a bill of costs.

In re Forsyth (1865) 34 Beav. 140; *In re Gold* (1871) 24 L. T. 9; and *In re Chapman* (1903) 20 Times L. R. 3, discussed.

APPEAL from an order of a Divisional Court (Bailhache and Sankey JJ.) discharging an order of Roche J. in chambers for delivery of a bill of costs.

In 1917 Mrs. F. C. Barnato was in financial difficulties, and her sons, I. H. W. Barnato (since deceased) and Woolf Barnato (herein called the applicant), agreed to pay her debts, taking a mortgage on certain policies of life insurance. The sons agreed that all costs, charges, and expenses in carrying out the arrangements made in connection with the affairs of their mother and of and incidental thereto should be paid by them in equal shares. The sons employed Mr. W. F. Foster, a solicitor, to carry out the arrangements and prepare the necessary deeds. Mr. Foster had previously acted as solicitor to Mrs. Barnato, but in connection with this matter she was separately represented by Mr. Haywood, a solicitor, who acted for her.

The applicant, who was 21 years of age on September 27, 1916, being about to proceed abroad on active service, on April 26, 1917, appointed his wife and Mr. W. F. Foster his attorneys to (inter alia) execute and sign any deeds or documents necessary for carrying out the arrangement as to the payment of the mother's debts. In connection therewith the two sons deposited a sum of money at a bank in the name of W. F. Foster, the account being called the William Frederick Foster H account, upon which Foster had power to draw cheques to pay the debts. Two deeds were executed, one dated March 24, 1917, and the other March 19, 1918, both prepared by Foster. The transactions were consolidated in the second deed, hence it is not necessary further to refer to

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the earlier deed except to say that Foster was not a party to either deed, the parties to both deeds being the same—namely, Mrs. F. C. Barnato (the mother), I. H. W. Barnato, and Woolf Barnato (the applicant). The applicant being abroad on active service when the second deed was executed, it was executed in his name by his wife and Foster as his attorneys. The second deed recited that the two sons (therein called “the lenders”) had paid the debts specified in the first indenture, and it also contained the following recital: “Whereas since the date of the first principal indenture” (the deed of March 24, 1917) “other payments have been made by the lenders to or for the borrower” (Mrs. F. C. Barnato) “at her request down to the 25th day of December, 1917, particulars whereof are set forth in the first part of the second schedule hereto, and the sum of 914*l.* 3*s.* 4*d.* therein appearing is the ascertained and agreed amount of the costs and disbursements of William Frederick Foster, the lenders’ solicitor, for the negotiations leading to the first and second principal indentures (1) and the costs and disbursements of and incidental to those indentures and of all other indentures, deeds, conveyances, mortgages, assignments, agreements and documents whatsoever entered into or carried out between the said parties in any way relating to the matters mentioned or referred to in the said principal indentures down to the 24th day of July, 1917.” It also contained a recital that the result of the accounts shown in the first and second parts of the second schedule as at December 25, 1917, showed an admitted total sum of 61,378*l.* 10*s.* due by the borrower to the lenders. The deed assigned certain life policies as security for the repayment of the sums advanced. In the first part of the second schedule amongst the debts paid there was the following item: “1917. Nov. 27th. W. F. Foster. His costs and disbursements down to 24th July, 1917, as solicitor to the lenders for services mentioned in the 6th recital to this deed. 914*l.* 3*s.* 4*d.*” The sixth recital is the one set out above. It

(1) There were in fact two indentures before this last indenture, but nothing turned on the second indenture, and so it is not necessary to refer to it.

appeared that on November 27, 1917, Foster drew a cheque for 914*l.* 3*s.* 4*d.* payable to himself upon the William Frederick Foster H account, and so paid himself that amount. No bill of these costs was delivered to the lenders.

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The applicant, on January 22, 1919 (his brother I. H. W. Barnato being then dead and Foster being the sole executor), took out a summons for an order (so far as material) that Foster should deliver to the applicant or to his solicitor a bill of costs in respect of the 914*l.* 3*s.* 4*d.* In an affidavit in opposition to the summons Foster stated that the item of 914*l.* 3*s.* 4*d.* “is for my costs and disbursements down to the 24th July, 1917, as solicitor to the applicant and his said brother as mortgagees in the loans made by them to their mother as mortgagor and in the transaction between them as mortgagees and their mother as mortgagor hereinafter referred to, but I say that it was agreed by all parties that the said costs were to be paid by the said Mrs. Barnato and were to be treated as one of her debts to be paid out of moneys to be lent to her as mortgagor by the applicant and his said brother as mortgagees”; and that none of the costs had been charged against the applicant, nor did he claim to charge them against the applicant, but on the contrary the whole of the costs had been properly charged against Mrs. Barnato and had been approved and agreed by her and had been paid by her out of moneys lent to her by the applicant and his brother. He further stated in relation to the payment of the 914*l.* 3*s.* 4*d.* out of the William Frederick Foster H account that long before November, 1917, it was understood that the costs when agreed by or on behalf of Mrs. Barnato should be deducted by him from and paid out of the said moneys, and that the amounts so paid and deducted should be added to the mortgage debt, and this was accordingly done. He submitted that “the only person entitled (if at all) to call for delivery of bills of costs in respect of the said costs is the said Mrs. Barnato. The said Mrs. Barnato not merely is not applying for any such bills, but has expressly approved and agreed the said costs, and I submit that the applicant’s claim is wholly misconceived and unfounded.” The applicant

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in his affidavit in reply said in substance that no part of the moneys provided by his brother and himself was intended to be paid to his mother, but the moneys were intended to be paid to Foster as their solicitor for the purpose of being applied in payment of her debts; that so far as the 91*l.* 3*s.* 4*d.* was concerned Foster was acting as their solicitor, and as such they were liable to pay his proper costs in relation to the business; and that the said payment of 91*l.* 3*s.* 4*d.* was not made with his knowledge or with the sanction of anyone authorized by him, and such an understanding as was alleged by Foster in his affidavit was not made with or by the applicant.

The master ordered a bill to be delivered, and this order was affirmed by Roche J. in chambers. The Divisional Court held that the case was not distinguishable from *In re Gold* (1), and set aside the order. The applicant by leave appealed.

McCall K.C. and *C. B. Marriott* for the appellant. The decision of the Divisional Court was wrong. It purports to rest on *In re Forsyth* (2) and *In re Gold* (1), neither of which supports it. In each of those cases a bill had been delivered and the application was to tax the bill. It failed because the bill could not be taxed without in effect rectifying a mortgage deed in which the amount of the bill formed part of the mortgage debt; the Court would not rectify a deed upon an application to tax; that must be done, if at all, by a proper proceeding instituted for the purpose. But the present application is not to tax a bill, but to have a bill delivered, an application which, if granted, may or may not lead to further proceedings. Consequently the ratio decidendi of *In re Forsyth* (2) and *In re Gold* (1) does not apply. So far however as the decisions in those cases were founded on estoppel they were wrongly decided. In neither case was the solicitor a party to the mortgage deed, and therefore there could be no estoppel. In *Carpenter v. Buller* (3) Parke B. said: "If a distinct statement of a particular fact is made in the recital of a bond, or other

(1) 24 L. T. 9; 19 W. R. 343. appeal 2 D. J. & S. 509.

(2) 34 Beav. 140, affirmed on (3) (1841) 8 M. & W. 209, 212.

instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital." And later on he said (1): "But there is no authority to show that a party to the instrument would be estopped, in an action by the other party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence." That statement of the law was approved by Erle C.J. and Williams J. in *Fraser v. Pendlebury* (2), and by Wood V.-C. in *Carter v. Carter*. (3) In the present case both those elements are wanting. The solicitor, who was acting as solicitor for the applicant and his brother in the matter, was not a party to the deed, and the application is not founded on the deed.

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There has been no "payment" of the bill of costs within the meaning of s. 41 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), because no bill has been delivered: *In re Street* (4), where Lord Romilly M.R. said: "I have held over and over again that there can be no payment, within the meaning of the 41st section of the Act, before the bill has been delivered, and before the client has had the opportunity of seeing the items. If a solicitor sells an estate, receives the purchase money, deducts the amount of his costs, and pays the balance to the client, that is not payment within the 41st section, if he has not delivered his bill of costs." In *In re West, King, and Adams* (5) Cave J., in delivering the judgment of Vaughan Williams J. and himself, said: "Now as to the retainer, Lord Langdale says in *In re Bignold* (6) during argument: 'I have never hitherto considered that the mere retainer by a solicitor out of moneys in hand of the amount of his bill amounted to payment, unless there has been a settlement of accounts'; and we have been able to find no case in which mere retainer has been treated as payment."

Patrick Hastings K.C. and *Lowenthal* for the solicitor. In

(1) 8 M. & W. 213.

(2) (1861) 31 L. J. (C. P.) 1.

(3) (1857) 3 K. & J. 617, 645.

(4) (1870) L. R. 10 Eq. 165, 167.

(5) [1892] 2 Q. B. 102, 107.

(6) (1845) 9 Beav. 269, 270.

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the case of mortgagor and mortgagee an order for taxation is never made on the application of the mortgagee. The mortgagee has his security for the payment to him by the mortgagor of a certain sum, and he cannot subsequently question the items making up that sum. In the case of a mortgage which recites the payment by the mortgagee of certain sums, including the solicitor's costs, and gives a charge for the total amount of those sums, so long as the deed stands the mortgagee cannot tax the solicitor's bill of costs: *In re Forsyth* (1); *In re Gold*. (2) He is a stranger to the bill of costs. The mortgagor is the person who really pays it, the practice being that the mortgagee pays the money and the solicitor deducts his costs from the amount so paid and hands over the balance to the mortgagor. The mortgagor alone can apply to tax, because he has paid the bill, and in the present case the mortgagor does not seek to tax. A bill will be at once delivered and taxed if Mrs. Barnato wishes it. *In re Chapman* (3), a decision of the Court of Appeal, shows that when a bill of costs is paid by a third person the client has no locus standi to apply for delivery of a bill. The amount of the bill does not concern him. The mortgagee has no interest in the matter; the mortgagor has in fact paid the debt, and the mortgagee cannot tax as well as the mortgagor. A person applying to tax must have a pecuniary interest in the matter. If the mortgagee can tax, the result may be that the bill on taxation may be reduced, but still, as long as the deed stands, the mortgagor is estopped from denying, as against the mortgagee, the correctness of the amount of the costs stated in the deed. Further, the Court will not disturb a long-established practice founded upon decisions of the Court which may have affected many transactions. The decision of the Divisional Court was therefore right. [Halsbury's Laws of England, vol. xxvi., Solicitors, s. 1294; and *In re Van Laun* (4) were also referred to.]

McCall K.C. in reply. The present application is made by a client against his own solicitor, who has paid himself out of the client's moneys lodged in the bank, for delivery of a bill of

(1) 34 Beav. 140.

(2) 24 L. T. 9.

(3) 20 Times L. R. 3.

(4) [1907] 1 K. B. 155; 2 K. B. 23.

costs. The client is entitled to have a bill delivered. The facts are very different from those in *In re Chapman*. (1) The applicant here has a pecuniary interest in the amount of the bill.

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June 16. SCRUTTON L.J. Bankes and Atkin L.JJ. desire me to state that they concur in the judgment I am about to read, which is to be taken as the judgment of the Court.

This is an appeal against an order of a Divisional Court refusing, on the application of mortgagees, to order a bill of costs to be delivered by a solicitor in respect of a sum of 914*l.* received by him by deduction, with the assent of the mortgagor, from sums supplied by the mortgagees for costs incurred before the execution of a mortgage deed.

Divested of legal technicalities the facts are that Mrs. Barnato was heavily in debt, and her two sons agreed to pay off her debts on receiving security in the shape of a mortgage on certain life policies. Mr. Foster had been solicitor to Mrs. Barnato, but in the matter of the preparation of the mortgage deed he acted as solicitor to the lenders, handing over the representation of Mrs. Barnato to a Mr. Haywood, a solicitor occupying the same offices as himself. The original deed was dated March 24, 1917. When the transactions were consolidated in a further deed dated March 19, 1918, Mr. Foster who prepared both deeds inserted a recital that the sum of 914*l.* 3*s.* 4*d.* appearing in the schedule was "the ascertained and agreed amount of the costs and disbursements of William Frederick Foster, the lenders' solicitor, for the negotiations leading to the first and second principal indentures and the costs and disbursements of and incidental to those indentures"; and in the schedule described the amount as "W. F. Foster's costs and disbursements down to July 24, 1917, as solicitor to the lenders for services mentioned in the 6th recital to this deed," already referred to. This deed, drawn by Mr. Foster, was signed on behalf of Woolf Barnato, the applicant in this case, by Mr. Foster himself and Mr. Woolf Barnato's wife, a

(1) 20 Times L. R. 3.

C. A. young lady of 26, acting under a power of attorney from Woolf
 1920 Barnato, absent from England on active service. On Novem-

 FOSTER ber 27, 1917, Foster had paid himself this amount by cheque,
In re. drawn by himself on funds supplied by the sons out of which
 BARNATO to pay their mother's debts. No bill has ever been delivered,
v. and no one has ever had the opportunity of checking the
 FOSTER. propriety of this claim for an amount which Mr. Foster has
 Scrutton L.J. himself inserted in the deed, and which he has paid himself
 without, except as hereinafter appears, any independent
 examination of the correctness of the account. Mr. Woolf
 Barnato applies for delivery of a bill; his brother is dead and
 his legal representative is Mr. Foster, who does not therefore
 join in the application.

The powers of the Court to order delivery of a bill and
 taxation rest, in the first place, on the original jurisdiction of
 the Court over its officers as explained by the House of Lords
 in *Storer v. Johnson* (1); in the second place, on s. 37 of the
 Solicitors Act, 1843, which empowers the Court to order
 delivery of a bill in any case where they could under the Act
 refer the bill for taxation if delivered. Indeed in some cases
 delivery of the bill may be ordered to see whether there are
 grounds for taxation: see per Lord Blackburn in *Duffett v.*
McEvoy (2), or followed by an order, not for taxation, but
 for an inquiry whether the agreement alleged in the bill is fair
 and binding on the client.

Further no difficulty arises in this case from the fact that
 there has been payment by retainer more than twelve months
 before the application, partly for the reason given by Lord
 Blackburn, partly because under the decision in *In re Street* (3)
 payment is not sufficient to start time running against the
 applicant unless it is payment of a delivered bill, and here no
 bill has been delivered. The difficulty in this case is as to
 whether the mortgagees can make this application, it being
 said that authority and long continued practice require the
 application to be made by the mortgagor, who in this case
 is content and is no party to the proceedings.

(1) (1890) 15 App. Cas. 203. (2) (1885) 10 App. Cas. 300, 302, 303.

(3) L. R. 10 Eq. 165.

The authorities which the Divisional Court have followed begin with two decisions of Lord Romilly's : *In re Forsyth* (1) and *In re Gold*. (2) In *In re Forsyth* (1) the facts were complicated. A third mortgagee to avoid a sale by a first mortgagee proposed to take over the first and second mortgages, and was informed by the solicitor to the first and second mortgagees that the sum due on the mortgages for costs was 450*l.*, which to make a round sum he would take at 425*l.* The third mortgagee took over the mortgages by deeds reciting that amounts were due on the first and second mortgages which included the 425*l.* ; the mortgagor was not a party to these deeds. The third mortgagee then found that the 425*l.* included sums not incurred by the mortgagees at all, but by the mortgagor in other matters, and not included in the mortgage security, and therefore applied to tax the bill. Lord Romilly, abstaining from deciding that the third mortgagee had no remedy in other proceedings, held that he was either trying to alter the accounts between mortgagor and mortgagee, in which case he must rectify the deed, or he was trying to tax a bill which could only be taxed on the application of the mortgagor. On the first ground, which was based in argument on estoppel, the solicitor was not a party to the deed, and it is difficult to see how he could claim the benefit of any estoppel contained in it : see per Mellish L.J. in *Ex parte Morgan* (3), citing with approval Parke B. in *Carpenter v. Buller*. (4) In *Fraser v. Pendlebury* (5) a mortgagor who had consented, though under protest, to the payment of a sum for costs on the assignment of a mortgage, and had signed a deed reciting that such a sum was due for costs, was held not estopped even against a party to the deed from reopening the sum. If this is so, it is difficult to see how a person not party to the deed can use the recital as an estoppel. The second ground of Lord Romilly's involves a consideration of the respective positions of mortgagor and mortgagee as to these costs, which I therefore postpone. When *In re Forsyth* went

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(1) 34 Beav. 140.

(3) (1876) 2 Ch. D. 72, 89.

(2) 24 L. T. 9.

(4) 8 M. & W. 209, 212, 213.

(5) 31 L. J. (C. P.) 1.

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to the Court of Appeal (1) the Lords Justices said nothing about the reasons given by Lord Romilly, but dismissed the application without prejudice to any other proceedings by the applicant on the ground that, as none of the proceedings had been in the Court of Chancery, there was no jurisdiction under the Act; and that the original jurisdiction of the Court could not be exercised in a common summons to tax. Neither of these reasons apply to the present case.

Six years later the case of *In re Gold* (2) came before Lord Romilly. There a second mortgagee took a transfer of the first mortgage under a deed containing a recital of an amount as due for costs, which was protested against before the execution of the deed. The transferee then applied to tax the bill, and Lord Romilly refused the application, following his previous decision in *In re Forsyth* (3), on the ground that the amount included in the deed could not be altered without rectifying the deed, for if the transferee taxed the bill and reduced it, to whom would the amount belong as between mortgagor and mortgagee? Again it is not clear why, if the solicitor has made an improper charge, or it is desired to have a bill to see whether his charge is improper, it is open to him to say: "This matter cannot be investigated, because, though you originally employed me, if my bill is reduced you must account for the reduction to someone else," or, "You would be estopped from saying against some one else that the amount is wrong."

There are two other cases on this head which need consideration. The first is *In re Chapman* (4), which is very shortly reported in the Times Law Reports, a summary of the judgment of one member of the Court only being given. A person who had taken out a summons in the police court consented to its withdrawal on payment of a sum to him and his solicitor's costs. The solicitor fixed his costs at a named sum, and the defendant paid them. The employer of the solicitor then claimed to tax the bill, and the Court refused the application on the ground as stated that, as the solicitor had been

(1) 2 D. J. & S. 509.

(2) 24 L. T. 9.

(3) 34 Beav. 140.

(4) 20 Times L. R. 3.

paid by a third person who had agreed the amount, the employer who was free from liability had no locus standi. There was apparently some question of money paid to avoid a criminal prosecution. A somewhat similar point was raised before Sir James Hannen in *Holditch v. Carter*. (1) There a will suit was compromised on the terms that the plaintiff should (inter alia) pay the defendant's solicitor 700*l.* for agreed costs, he having already received 400*l.* from the defendant. The sum of 700*l.* was paid by the plaintiff. An order was made that a bill should be delivered, and one was delivered for 710*l.* On an application by the defendant to tax the bill Sir James Hannen refused it on the ground that it had been paid, and there were no special circumstances to reopen taxation. The attention of the judge does not seem to have been called to *In re Street* (2), that there can be no payment to exclude taxation before delivery of a bill. But in this case the bill was directly paid by another party who agreed the amount.

This renders it necessary to consider the exact position of mortgagor and mortgagee as to the costs of preparation of the mortgage deed, which are the costs in this case. The original practice is stated by Taunton J. in *Pratt v. Vizard* (3): "Now in the case of annuities, and I believe in that of mortgages also, the law expenses do, in practice, ultimately come out of the pocket of the borrower; but the grantee" (i.e., the mortgagee) "employs his own attorney; the business is done on the credit of the lender, and the action for work and labour would lie against him, and not against the borrower; though when the business is done, and the money is handed to the borrower, the attorney takes care to come with his bill, and is paid with so much of the money borrowed, the mortgagor receiving the advance minus that amount. But there is no lien between the attorney and the mortgagor; that can only arise from one party doing something, and the other having it done for him." Working out this practice in *Wales v. Carr* (4) Farwell J. had to consider whether the mortgagee's costs of preparing the

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(1) (1873) L. R. 3 P. & M. 115.

(2) L. R. 10 Eq. 165.

(3) (1833) 5 B. & Ad. 808, 813.

(4) [1902] 1 Ch. 860.

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mortgage deed could be added to his security as part of his costs, charges, and expenses, or were simply a common law debt of mortgagor to mortgagee. As he says (1): "This question rarely arises in practice, because in the great majority of cases the mortgagee or his solicitor takes care to retain these costs out of the mortgage moneys before they are handed over." But in principle he accepts the view of Sir George Jessel M.R. in *Ex parte Firth* (2): "When a mortgage is completed the mortgagor is liable" (at common law) "to pay to the mortgagee the expenses incident to the mortgage transaction. The mortgagee is primarily liable to his own solicitor for those expenses. The mortgagor is liable to pay over to the mortgagee what he pays to his own solicitor, but there is no debt until the transaction is completed." The primary liability is therefore that of the mortgagee, and while the work is being done no other person is chargeable. This is borne out by the fact that, if a taxation takes place at the instance of the mortgagor, the question to be investigated is the liability of the mortgagee to the solicitor, and if the mortgagee could not tax as against the solicitor, neither can the mortgagor. This is explained by Lord Romilly in his judgment in *In re Baker* (3), though it is doubtful whether the practice which he speaks of, of the mortgagee being a party to the mortgagor's taxation, is followed at present. A similar rule was acted on by the same judge in *In re Massey* (4) in the case of persons chargeable under s. 38 of the Act.

Applying these principles to the present facts, the solicitor was originally employed by the mortgagees, and until the mortgage deed was entered into they and no one else were the only persons liable. The liability of the mortgagor to the mortgagees arose when the mortgagees paid their solicitor, which they did when money was deducted by the solicitor for this purpose out of moneys provided by the mortgagees for the payment of the mortgagor's debts. The transaction if fully carried out would have been that the mortgagees would have paid their solicitor, and reimbursed themselves against

(1) [1902] 1 Ch. 864.

(2) (1882) 19 Ch. D. 419, 427.

(3) (1863) 32 Beav. 526.

(4) (1865) 34 Beav. 463.

the mortgagor by deducting the sum from the money they were advancing on mortgage. The mortgagor might have questioned the amount of this sum against the mortgagees, but if she did so against the solicitor would have had to do so according to the rights and relations existing between the mortgagees and their solicitor. In principle, the mortgagees here have paid their solicitor, though in fact the solicitor has paid himself. He has done so as agent of the mortgagees, and it may well be that in other proceedings he may be called to account for paying such a sum as agent, without having its fairness ascertained by taxation, and delivery of a bill may be necessary for this purpose. But on the question of delivery of a bill, I do not understand Lord Romilly's view that only the mortgagor can make the application. It seems to me, on the principles of Lord Romilly's own judgments and of the other cases cited, the primary liability is that of the mortgagee, and it is that liability which gives him a claim against the mortgagor, on whom the solicitor has no direct claim. In this case indeed there are no funds available for the mortgagor out of which the costs after the execution of the mortgage deed can be paid, and the solicitor is claiming these costs against the mortgagees, which appears to me to render it very desirable that the complete and detailed list of charges for the whole set of transactions should be available.

I am unable to agree with the reasons on which Lord Romilly decided *In re Forsyth* (1) and *In re Gold*. (2) So far as they are based on estoppel, they do not seem to avail a person who is not party or privy to the deed ; so far as they are based on the relations of mortgagor and mortgagee, as applied to costs before the execution of the deed, they do not appear to me correctly to work out the principles on which these relations depend. The probable explanation of the judgments is that Lord Romilly treated the matter as an application to reopen accounts between mortgagor and mortgagee, the mortgagor not being a party, and the deed admitting the amount not being rectified. From this point of view I understand the decisions, though they would not seem to apply to an application

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(1) 34 Beav. 140.

(2) 24 L. T. 9.

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by the mortgagee against his solicitor, who incurred the costs on his instructions. *In re Chapman* (1) is too shortly and inadequately reported to enable me to treat it as binding on me; there appears to have been some direct agreement between the solicitor and the person who paid him. This was also the case in *Holditch v. Carter* (2), where the attention of Sir James Hannen does not appear to have been called to *In re Street*. (3) If there is any practice based on these authorities, the sooner it is departed from the better, as the effect seems to be to remove the control of the charges of an officer of the Court from his client and the Court to the mortgagor, who is generally only too ready to consent to any deductions to get the money which his necessities require.

In this case, even if there were no jurisdiction under the Act, I should have thought that delivery of a bill should be ordered under the general jurisdiction of the Court over its officers. In whatever capacity he acted, Mr. Foster seems, whether intentionally or unintentionally, to have taken every step which might have the effect of preventing the correctness of his charges being investigated. He inserts the recitals in the deed he drafts; he signs the deed as attorney for the absent son; as executor of the dead son he refuses to concur in an application for delivery of the bill; and acting as agent for his employer he pays himself without taking any steps to protect his employer by getting the charges against him taxed. He hands over the representation of Mrs. Barnato to a solicitor occupying the same office as himself, and while of course I express no final opinion about Mr. Haywood's charges, who is not before me, if it is true as stated in the affidavit that he has charged a lump sum of 500*l.*, and has no materials which enable him to state what work he has done for it, the transaction if honest may give rise to misunderstanding, and in the hands of unscrupulous people might cover up abuses. This, however, is not the time to express any opinion on the propriety of Mr. Foster's charges, and I have not heard Mr. Haywood, who is not a party to this application.

(1) 20 Times L. R. 3.

(2) L. R. 3 P. & M. 115.

(3) L. R. 10 Eq. 165.

In my opinion therefore Mr. Foster should be ordered to deliver a bill of the 914*l*. I express no opinion whether, when it is delivered, an order for taxation or any other order should be made; or what will be the result between mortgagor and mortgagee of any such order, or the results thereof. The appeal should be allowed with costs here and in the Divisional Court to be paid by Mr. Foster.

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Appeal allowed.

Solicitor for applicant : *Grant McLean.*

Solicitor for respondent : *W. F. Foster.*

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June 1, 2,
22.

Shipping—Charterparty—Hire—Provision for Cesser of Hire—Ejusdem generis Rule.

A steamship was chartered at a certain rate of hire per month and was to be employed between safe ports within defined limits. Clause 12 of the charterparty provided that "in the event of loss of time from deficiency of men or owners' stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service; but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account." During the currency of the charterparty the steamer was ordered to discharge at Marans. While going up the river to that port she got aground on soft clay on October 16, 1916, and remained aground till October 24, 1916. She was damaged by the occurrence. Repairs commenced on November 8 and occupied a substantial time. Marans was a safe port, and there was no bar in the harbour, river or port which caused detention through grounding or otherwise. In an arbitration between the owners and charterers, the arbitrator awarded that hire ceased (a) between October 16 and October 24, 1916, and (b) during the time occupied

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while the damage to the steamer consequent upon the grounding was being repaired :—

Held, that the ejusdem generis rule could not be applied to the words “or other accident” in the first part of clause 12; that those words covered any accidental occurrence to the steamer which prevented her working for more than twenty-four consecutive hours; and therefore the award was right.

The ejusdem generis rule of construction discussed.

AWARD in the form of a special case.

The following statement of facts is taken from the judgment :

“This award in the form of a special case involves the construction of a charterparty between the owners of the steamship *Magnhild* and McIntyre Bros. & Co.

“The charterparty is dated August 7, 1916. It is in the form known as the Baltic and White Sea Conference Uniform Time Charter, 1912, for European, etc., Trade (as revised at Berlin in 1912). It contains (inter alia) the following clauses. Clause 1 is : ‘The said owners agree to let, and the said charterers agree to hire the said steamer for the term of six calendar months fifteen days more or less from the time . . . the said steamer is delivered and placed at the disposal of the charterers . . . to be employed in lawful trades . . . between good and safe ports or places within the following limits—United Kingdom, Continent, Calais/Sicily limits—where she can always safely lie afloat or safe aground as charterers or their agents shall direct.’ Clause 5 is : ‘That the said charterers shall pay as hire for the said steamer 3400*l.* per calendar month, commencing from the time the steamer is placed at the disposal of charterers . . . in cash, without discount, monthly in advance.’ Clause 12 is : ‘That in the event of loss of time from deficiency of men or owners’ stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service; but should the steamer be driven into port, or to anchorage by stress of weather, or from any accident to the cargo, or in the event of the steamer trading to shallow harbours, rivers, or ports

where there are bars causing detention to the steamer through grounding or otherwise, time so lost and expenses incurred (other than repairs) shall be for charterers' account.'

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"The facts as found by the arbitrator can be briefly stated. The steamer loaded at Sunderland and was fixed by the charterers to discharge at La Rochelle, La Pallice, Rochefort, or Tournay Charante in France. By the direction of the French Government the steamer was ordered to proceed to the Ile d'Aix for orders. She was then ordered by the French Government to discharge at Marans. She arrived at Marans Roads at 6 P.M. on October 16, 1916, and she got aground on soft clay whilst proceeding up the river at a little bend between two buoys. She remained so aground till 1 P.M. on October 24, 1916. She then got off. She was damaged by the occurrence. Repairs commenced on or about November 8 and they occupied a substantial time. Marans was a safe port within the meaning of the charterparty. There was no bar in the harbour, river or port which caused detention through grounding or otherwise. The arbitrator awarded that hire ceased, (a) as from 6 P.M. on October 16, 1916, till 1 P.M. on October 24, 1916, and (b) during the time occupied while the damage to the steamer, consequent upon such grounding, was being repaired."

Leck K.C. and *Jowitt* for the owners. Hire continues to be payable under the charterparty unless the charterers can bring themselves within clause 12. The question is, What meaning is to be attributed to the words "or other accident," etc., in the first part of that clause? It is submitted that those words must be construed as ejusdem generis with the words which precede; therefore "or other accident" must be something which makes the steamer, as a steamer, inefficient to prosecute the voyage: see per Willes J. in *Fenwick v. Schmalz*. (1)

[McCARDIE J. Is there such a rule as the ejusdem generis rule? In each case you have to construe the particular instrument.]

(1) (1868) L. R. 3 C. P. 313, 315.

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The rule has been applied in a large number of cases. Applying the rule in this case it is clear that what happened did not make the steamer qua steamer inefficient to prosecute her voyage.

The intention of the second part of clause 12 is to prevent the cessation of hire should there be an accident caused by the particular difficulties enumerated.

Bevan K.C. and *Claughton Scott* for the charterers. Any accident preventing the working of the steamer is within clause 12. There is no room for the application of the ejusdem generis rule as there is no genus to be found in the words preceding "or other accident." The charterers therefore come within the first part of the clause; and the second part has no application. [They cited *Jersey (Earl) v. Neath Union* (1) and *Smailes v. Evans*. (2)]

Leck K.C. in reply referred to *Thames and Mersey Marine Insurance Co. v. Hamilton* (3) and *SS. Knutsford v. Tillmanns*. (4)

Cur. adv. vult.

June 22. McCARDIE J. read his judgment which, after stating the facts above set out, continued: The contention of the owners was that on the true meaning of the charterparty the charterers were not entitled to a cesser of hire for the time lost owing to the grounding of the vessel in the river as aforesaid, or whilst the resultant damage to the vessel was being repaired. This contention raises a difficult question, whether or not the ejusdem generis rule did or did not apply to the words "or other accident preventing the working of the steamer."

Before the hearing of this case I had often felt a difficulty in stating, and an equal difficulty in applying, this rule. After hearing the able arguments here of Mr. Leck and Mr. Stuart Bevan, and reading many decisions, I realize still more acutely the difficulties which surround the real meaning and the juristic operation of the ejusdem generis doctrine. If I regard this

(1) (1889) 22 Q. B. D. 555, 566.

(3) (1887) 12 App. Cas. 484, 501.

(2) [1917] 2 K. B. 54.

(4) [1908] A. C. 406.

case as it would be looked at by the ordinary layman of business experience and intelligence I should have no real doubt that the words "or other accident preventing the working of the steamer" covered the facts of the present case. It is, I conceive, clear that there was an accident, and, indeed, if the fortuitous, unexpected, and injurious event which here took place was not an accident I know not what an accident can be. That the accident prevented the working of the steamer seems equally clear. *Prima facie*, therefore, the award of the arbitrator is right. But Mr. Leck has rested his argument upon the contention that the *ejusdem generis* rule applies to the words in question and that they must be read subject to, and limited by, the preceding words of clause 12. Hence, I feel it may be useful to examine concisely the *ejusdem generis* doctrine and to refer to the more relevant decisions. It is an unfortunate circumstance that so important a matter of law should be surrounded with so large a measure of obscurity. The dangers of the rule have been indicated by high authority. Thus Fry L.J. said in *Jersey (Earl) v. Neath Union* (1) (where the document was a deed of conveyance reserving minerals): "The so-called doctrine of *ejusdem generis*, which, I think, has often been urged for the sake of giving not the true effect to the contracts of parties, but a narrower effect than they were intended to have." These words of Fry L.J. were cited with approval by Lord Loreburn L.C. in *Larsen v. Sylvester* (2) (a charterparty case) when pointing out the danger of loosely applying the *ejusdem generis* rule. In the same case Lord Ashbourne says (3) that the above cited words of Fry L.J. were "wise and reasonable words." Yet, in this very case of *Larsen v. Sylvester* (3) I find that Lord Robertson says: "I hope nothing will be deduced from our decision to-day which shakes the soundness of what is called the *ejusdem generis* rule of construction, because it seems to me that both in law and also as matter of literary criticism it is perfectly sound," and in

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(1) 22 Q. B. D. 555, 566.

(2) [1908] A. C. 295, 296.

(3) *Ibid.* 297.

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the report of this decision in Commercial Cases (1) (though this does not appear in the Law Reports) Lord Loreburn seems to have said at the end of the opinions: "I only desire to say that I agree with what my noble and learned friend Lord Robertson has said as regards the well-established rule of *ejusdem generis*." Equally significant are the words of Rigby L.J. in *Anderson v. Anderson* (2) (a post-nuptial settlement case). He there stated: "The doctrine known as that of *ejusdem generis* has, I think, frequently led to wrong conclusions on the construction of instruments." But the rule exists, and it has been assiduously applied by the Courts to statutes, commercial documents and many other instruments. The risk seems to be that the rule may develop into a juristic fetish.

As to statutes, a large number of decisions are collected in Maxwell on Statutes, 6th ed., pp. 583 et seq. That learned author at p. 583 says: "But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words: or, in other words, as comprehending only things of the same kind as those designated by them; unless, of course, there be something to show that a wider sense was intended." At p. 592 he says: "Of course, the restricted meaning, which primarily attaches to the general word in such circumstances, is rejected when there are adequate grounds to show that it was not used in the limited order of ideas to which its predecessors belong." At p. 596 he says: "The general principle in question applies only where the specific words are all of the same nature. Where they are of different genera, the meaning of the general word remains unaffected by its connection with them." These passages illustrate the complexity of the rule.

It is interesting to contrast the presumption of restriction apparently indicated by Maxwell with the following words by Lord Selborne in *Attorney-General of Ontario v. Mercer* (3) (a case on the construction of the British North America

(1) (1908) 13 Com. Cas. 328, 333.

(2) [1895] 1 Q. B. 749, 755.

(3) (1883) 8 App. Cas. 767, 778.

Act, 1867): "It is a sound maxim of law, that every word ought, *prima facie*, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context." At the root of many cases involving the applicability or not of the *ejusdem generis* rule there might well appear to be a question as to whether a presumption exists that general words are, *prima facie*, limited by preceding special words. This point was stated but expressly left unsolved by Hamilton J. in his powerful judgment in *Thorman v. Dowgate Steamship Co.* (1) (a charter-party case). He there said (2): "Considerable discussion arose . . . as to whether the presumption of law is that general words are general until they can be shewn to be particular, or whether general words are *ejusdem generis* with the particular words until they can be shewn to be general without any limitation. I do not think it is now necessary," he added, "to embark upon that discussion."

If any real presumption exists one way or the other it might substantially affect the interpretation of many documents. Nowhere perhaps has it been definitely and authoritatively laid down that any presumption exists. It is difficult to see how it could satisfactorily exist. For a fundamental rule of construction is that every part of a document must be fully considered ere any portion of such document be interpreted. If so, it results that general words which are sequent to specific words cannot well be the subject of any presumption at all, inasmuch as they cannot be considered separately from the preceding words without violating the fundamental rule. In *Barton v. Fitzgerald* (3) Lord Ellenborough said (the case of a lease under seal): "It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done." And in *Hayne v. Cummings* (4) (a case as to an agreement

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(1) [1910] 1 K. B. 410.

(2) *Ibid.* 420.

(3) (1812) 15 East, 530, 541.

(4) (1864) 16 C. B. (N. S.) 421, 427.

1920 for a lease) Byles J. said : " I apprehend it is a sovereign rule in the construction of all written documents, to give effect to the intention of the parties as expressed in the instrument itself, and to give effect if possible to every word, or at all events to every provision." If any presumption exists that the rule applies whenever general words follow special words, then an added point would be given to the remarks of Lindley M.R. in *In re Stockport Ragged, &c., Schools* (1) (which turned on an Act of Parliament), where he said : " I am quite aware that there have been cases, such as *Anderson v. Anderson* (2) (to which I drew attention during the argument), where the Court has protested against pushing the doctrine of ejusdem generis too far. It is very often pushed too far." That any such general presumption exists seems however to be contrary to the view of Lord Esher M.R. in *Anderson v. Anderson* (2) (a will case) where he said (3) : " I entirely adopt the canon of construction which was laid down by Knight Bruce V.-C. in *Parker v. Marchant* (4), and I reject the supposed rule that general words are prima facie to be taken in a restricted sense." But although there may be no general presumption applicable to documents so various as statutes, deeds, wills, or commercial contracts yet it is impossible to overlook the fact that the ejusdem generis rule has been so frequently and firmly applied to such contracts as charterparties, bills of lading and policies of marine insurance that undoubtedly both lawyers and commercial men habitually incline to the view that general words in such contracts are in the majority of cases normally to be restricted by preceding specific words. This is consistent with the observation of Bowen L.J. in *Jersey (Earl) v. Neath Union* (5), where he states that the ejusdem generis rule " is after all but a working canon to enable us to arrive at the meaning of the particular document." See too the judgment of Hamilton J. in *Thorman v. Dowgate Steamship Co.* (6), where he says : " The ejusdem generis

(1) [1898] 2 Ch. 687, 696.

(2) [1895] 1 Q. B. 749.

(3) *Ibid.* 754.

(4) (1842) 1 Y. & C. Ch. 290.

(5) 22 Q. B. D. 555, 561.

(6) [1910] 1 K. B. 410, 416.

rule is a canon of construction only. The object of it is to find the intention of the parties. The instrument, the nature of the transaction, and the language used must all have due regard given to them, and although it is a commonplace to observe it, I think it is important to bear in mind, first of all, that this is a clause of a kind very familiar in ordinary contracts of carriage or contracts connected with the carriage of cargoes." This observation explains the words of Lord Macnaghten in *SS. Knutsford v. Tillmanns* (1) (a charterparty case), where he said: "I think the rule of ejusdem generis applies as laid down in *Thames and Mersey Marine Insurance Co. v. Hamilton* (2), and I prefer to take the rule on a point of that sort from a case which did deal with bills of lading and shipping documents rather than from cases that dealt with real property and settlements."

Bearing these observations in mind I next ask: What is this ejusdem generis rule? The matter was cautiously put by Lord Halsbury in *Thames and Mersey Marine Insurance Co. v. Hamilton* (3), where he said: "Two rules of construction now firmly established as part of our law may be considered as limiting those words. One is that words, however general, may be limited with respect to the subject matter in relation to which they are used. The other is that general words may be restricted to the same genus as the specific words that precede them." Now this statement seems to prevent the application of the rule unless a genus can be found. That view is fully agreeable to the opinion expressed by the Court of Appeal in *Tillmanns v. SS. Knutsford*. (4) Vaughan Williams L.J. said (5): "If a common genus is not to be found the necessary consequence would be that the words 'or any other cause' could not be limited by the doctrine of ejusdem generis." Farwell L.J. said (6): "Unless you can find a category there is no room for the application of the ejusdem generis doctrine." Kennedy L.J.

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(1) [1908] A. C. 406, 409.

(2) 12 App. Cas. 484, 490, 501.

(3) 12 App. Cas. 490.

(4) [1908] 2 K. B. 385.

(5) Ibid. 395.

(6) Ibid. 403.

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said (1) : " The genus must first be found, and then you must find whether the words that follow are applicable to the species enumerated belonging to the one genus." So too in *Larsen v. Sylvester* (2) Lord Loreburn L.C. said : " Those words follow certain particular specified hindrances which it is impossible to put into one and the same genus." What then is a genus ? I confess that I find great difficulty in answering the question. How the language of natural history came to be applied to the construction of commercial documents or to statutes, wills and deeds, I know not. The phrases of science deal with precise things. The phrases of law deal with matters of infinite ambiguity and cross division. Hence it was well said by Hamilton J. in *Thorman's Case* (3) : " It is not necessary that either genus or differentia should be of extreme scientific precision." But the rule of ejusdem generis cannot be applied at all unless there be some broad test for the ascertainment of genus. So far as I can see the only test seems to be whether the specified things which precede the general words can be placed under some common category. By this I understand that the specified things must possess some common and dominant feature. Thus in *Fenwick v. Schmalz* (4) (a charterparty case) the words were " except in cases of riots, strikes, or any other accidents beyond his control." The Court apparently thought that the words " other accidents " meant accidents ejusdem generis with riots and strikes in which human instrumentality was concerned. So too in *In re Richardsons and Samuel & Co.* (5) (a charterparty case) the charterparty excepted, amongst other things, " strikes, lock-outs, accidents to railway " and also " other causes beyond charterer's control." The Court of Appeal held that the ejusdem generis rule applied. A. L. Smith L.J. said (6) : " Of course there must be some limitation put upon these words " [that is, the general words], " otherwise the words that precede would be mere surplusage. In my opinion this clause must be read as covering exceptions ejusdem generis

(1) [1908] 2 K. B. 409.

(2) [1908] A. C. 295, 296.

(3) [1910] 1 K. B. 410, 422.

(4) L. R. 3 C. P. 313.

(5) [1898] 1 Q. B. 261.

(6) Ibid. 266.

with those that precede it—that is, matters that deal with the impossibility of getting the oil to the port and into the ship.” Thus the Court found that the specific words in question fell under a common category.

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Speaking broadly, the judges in the past seem to have been somewhat acute to find, if reasonably possible, a common category in charterparties, bills of lading and policies of insurance. This seems evident from the decisions such as *Mudie v. Strick & Co.* (1) and *Thorman's Case* (2) both cases of charterparties. Several authorities are collected in the luminous work on Charterparties by Scrutton L.J., 9th ed., pp. 221–222. I need only add that if the particular words exhaust a whole genus the general words must refer to a larger genus. See per Willes J. in *Fenwick v. Schmalz.* (3) But, even if a common category be found there still arises a question as to the operation of the ejusdem generis rule. Must the particular facts in question be similar to one or other of the specified things ere they can be allowed to fall within the general words, or will it suffice if they fall within the genus? Even on this point there seems much doubt. In *Thames and Mersey Marine Insurance Co. v. Hamilton* (4) Lord Macnaghter said, when speaking of general words in a policy of marine insurance, “Ever since the case of *Cullen v. Butler* (5), when they first became the subject of judicial construction, they have always been held or assumed to be restricted to cases ‘akin to’ or ‘resembling’ or ‘of the same kind as’ those specifically mentioned.” In an earlier passage, however, he had said that “their office is to cover in terms whatever may be within the spirit of the cases previously enumerated.” In *Thorman's Case* (6) Hamilton J. said: “The mere consideration that so many matters have been carefully enumerated (quite superfluously so, unless some restriction is placed on the subsequent words ‘any other cause beyond my control’) would lead one to construe that clause according to the ejusdem generis rule, and to say that it was intended

(1) (1909) 14 Com. Cas. 135.

(4) 12 App. Cas. 484, 501.

(2) [1910] 1 K. B. 410, 422.

(5) (1816) 5 M. & S. 461.

(3) L. R. 3 C. P. 313, 315.

(6) [1910] 1 K. B. 410, 417.

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by the parties that the time should not count only if the various matters specifically enumerated, or any other cause, similar to them and beyond the charterer's control, interfered with the loading." Yet Scrutton L.J. points out in his work on Charterparties, p. 222, as follows: "It must be remembered that the question is whether a particular thing is within the genus that comprises the specified thing. It is not a question (though the point is often so put in argument), whether the particular thing is like one or other of the specified things. The more diverse the specified things the wider must be the genus that is to include them: and by reason of the diversity of the specified things the genus that includes them may include something that is not like any one of the specified things." This, I most respectfully think, is a most cogent, useful and accurate statement. I need only add that the comparative ease with which the ejusdem generis rule can be prevented from applying is shown by *Larsen v. Sylvester* (1), where the words "of what kind soever" were held sufficient for that purpose.

Now, in directing the above observations to the present case I do not overlook the fact that unless the charterers can bring themselves within the first part of clause 12 hire continued to be payable throughout the chartered period: see Scrutton on Charterparties, 9th ed., art. 146 and notes. Upon the best consideration I can give to this case, I come to the view that the ejusdem generis rule does not here apply. I cannot create a genus (whether scientific or otherwise) out of the specific words. I see no common or dominating feature of such words. Default of the owners cannot, of course, be such a feature, for the matters mentioned in the specific words could arise either with or without such default. Unseaworthiness, whether due to owners' default or not, cannot be a common or dominating feature inasmuch as damage to hull might supervene, although the ship was perfectly seaworthy. Human agency cannot be a common or dominating feature, for damage to hull might arise through tempest

(1) [1908] A. C. 295.

or the like as well as through accident caused by human fault. If then there be no such common or dominating feature the ejusdem generis rule cannot apply. Even if a genus could be found it would, I think, be so wide (having regard to the totality of words) as to allow the present facts to fall within the general words. Those words are, moreover, "or other accident," etc., which appear to suggest that the precedent genus, if any, was intended to cover cases of accidental occurrences to the ship which prevented her working for twenty-four hours or more. The latter part of clause 12, I also think, seems to assume a wide meaning of the first part. Upon clause 12 as a whole, I form the view that the parties intended that a suspension of hire should ensue under the circumstances here found by the arbitrator. I therefore uphold the award. The owners must pay the costs of the proceedings before me.

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Award upheld.

Solicitors for owners : *Botterell & Roche.*
Solicitors for charterers : *W. A. Crump & Son.*

J. S. H.

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 June 10, 11. HOUSING ACT, 1919.

*Housing (Additional Powers) Act, 1919 (9 & 10 Geo. 5, c. 99), s. 5, sub-ss. 1, 2—
 Appeal from Order prohibiting building—Duty of Tribunal of Appeal
 to hear Appellant—Essentials of a "hearing."—Regulation of Building
 (Appeal Procedure) Rules, 1920.*

Under the Housing (Additional Powers) Act, 1919, the local authority are empowered to prohibit building operations which interfere with the provision of dwelling houses, the party prohibited being given a right of appeal to an Appeal Tribunal, subject to rules of procedure to be made by the Minister of Health.

By rules of procedure made by the Minister the party aggrieved by a prohibition order is to send a notice of appeal to the Appeal Tribunal, and the local authority are to send a statement in reply setting out the grounds of the order and stating whether and to what extent they admit the facts stated in the appellant's notice of appeal. By r. 7 of those rules: "If, after considering the notice of appeal and the statement of the local authority in reply and any further particulars which may have been furnished by either party, the Appeal Tribunal are of opinion that the case is of such a nature that it can properly be determined without a hearing, they may dispense with a hearing, and may determine the appeal summarily."

A company proposed to build a picture house. The local authority prohibited the building, and the company appealed. The Appeal Tribunal, having received the appellant's notice of appeal and the local authority's statement in reply, upon consideration of those two documents alone, without giving the appellants any opportunity of controverting the statements in the local authority's reply, and without any notice to the parties, dismissed the appeal:—

Held, that the meaning of r. 7 was that the Tribunal of Appeal might dispense with an oral hearing, not that they might dispense with a hearing of any kind. They were bound to give the appellants a hearing in the sense of an opportunity of making out their case.

Held (by Earl of Reading C.J. and Sankey J., Shearman J. dissenting); that under the circumstances the Tribunal of Appeal, not having given the appellants any opportunity of correcting or explaining the statements in the local authority's reply which were prejudicial to their case, had not given them a hearing at all, and that the order dismissing the appeal must be set aside.

In June, 1919, the Alhambra Picture House (Huddersfield), Ltd., purchased certain premises which they proposed to convert into a picture house and restaurant, and they submitted their plans for the proposed conversion to the

corporation of the borough for approval. On March 17, 1920, the corporation, as the local authority acting under s. 5, sub-s. 1, of the Housing (Additional Powers) Act, 1919 (9 & 10 Geo. 5, c. 99 (1), made an order prohibiting the said company from carrying out the proposed works on the ground that their construction would be likely to delay the provision of dwelling houses in the area by reason of their causing a deficiency of labour and materials, and that there was a growing shortage of skilled labour and suitable building materials for house construction in Huddersfield. On March 26 the company, being aggrieved by the said order, appealed to the Minister of Health under s. 5, sub-s. 2, by sending to the clerk to the Appeal Tribunal, appointed by the Minister pursuant to the said section, a notice of appeal in which they

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(1) By s. 5, sub-s. 1, of the Housing (Additional Powers) Act, 1919: "Where it appears to a local authority that the provision of dwelling accommodation for their area is or is likely to be delayed by a deficiency of labour or materials arising out of the employment of labour or material in the construction within their area of any works or buildings. . . . the authority may by order prohibit the construction of those works or buildings."

Sub-s. 2: "Any person aggrieved by an order made by a local authority under this section may, subject to rules of procedure to be made by the Minister, appeal to the Minister, and on any such appeal the Minister shall refer all such cases to a standing tribunal of appeal, consisting of five persons, to be appointed by the Minister."

The Regulation of Building (Appeal Procedure) Rules, 1920, made in pursuance of that section provide by:—

Rule 3. That notice of appeal is to be sent to the clerk to the Appeal Tribunal, who is to send a copy of it to the local authority.

Rule 5: "The local authority shall, within seven days after the receipt by them of the said notification, send a notice to the clerk to the Appeal Tribunal and to the appellant stating whether and to what extent they admit the facts stated in the appellant's notice of appeal and including a concise statement of the grounds on which the order is based."

Rule 6: "The Appeal Tribunal may require the appellant or the local authority within a specified time to furnish in writing such further particulars as they think necessary."

Rule 7, sub-r. 1: "If, after considering the notice of appeal and the statement of the local authority in reply and any further particulars which may have been furnished by either party, the Appeal Tribunal are of opinion that the case is of such a nature that it can properly be determined without a hearing, they may dispense with a hearing, and may determine the appeal summarily."

Sub-r. 2: "Subject as aforesaid the Appeal Tribunal shall fix a date for the hearing of the appeal."

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stated (inter alia) as the main grounds of their appeal (1.) that the provision of dwelling accommodation was not likely to be delayed by the proposed conversion, (2.) that there was no shortage of labour in the Huddersfield district, and (3.) that no building material suitable for the erection of houses would be required in the construction of the said works, and that most of the building material necessary was already on the works. On April 3 the corporation sent to the clerk to the Appeal Tribunal and to the appellants their statement in reply, in which they set out the grounds of the order as stated above and traversed the statements in the grounds of appeal. They also stated (amongst other facts) that the shortage of men was proved by the fact that on 114 houses which the corporation were then erecting there were only 15 masons engaged, and no more could be obtained, whereas there ought to be at least 40 men on the job ; that there was a difficulty in getting materials and particularly an adequate supply of wall-stone ; that the appellants' contemplated works were luxury buildings and would absorb 6 masons and bricklayers, 6 labourers, 4 joiners, and 4 plasterers for 6 months, in addition to many other men. On April 28 the Appeal Tribunal having considered the notice of appeal and the grounds of the appeal and also the reply of the corporation, but upon consideration of those two documents alone, and without notice to the parties, came to the conclusion that no case was made out by the appellants for the disallowance of the order of the corporation, and they summarily dismissed the appeal. The appellants obtained a rule nisi for a certiorari to bring up the order of the tribunal dismissing the appeal to be quashed upon the grounds, (1.) that r. 7 (1.) of the Regulation of Buildings (Appeal Procedure) Rules, 1920, was ultra vires, and (2.) that no opportunity of being heard was given to the appellants or to reply to or to give further particulars in answer to the local authority's answer to the appeal. They also obtained a rule nisi for a mandamus to the Tribunal of Appeal to hear and determine the appeal. (1)

(1) It appeared from an affidavit made by Mr. Ernest Charles, K.C., the chairman of the Tribunal, in answer to the rules, that "The other

Sir Ernest Pollock S.-G. and *Branson* for the Tribunal of Appeal showed cause. The proceedings of the Appeal Tribunal were strictly regular. They were in accordance with the Appeal Procedure Rules made under the Act. Those rules do not require anything more than a statement in writing by each party of his case unless the Appeal Tribunal call for any further particulars in the exercise of their discretion under r. 6. Here the tribunal did not think it necessary to do so, as they considered they had got all the materials for arriving at a decision before them. The appellants had no right to have their appeal heard orally: *Local Government Board v. Arlidge*. (1) Rule 7 expressly provides that the tribunal if they think proper may dispense with a hearing and determine the appeal summarily. The right of appeal given by s. 5, sub-s. 2, of the Act is expressed to be "subject to rules of procedure to be made by the Minister." The rules were designed to shorten the proceedings on appeal as much as possible, as it is of the utmost importance that decisions should be given speedily. The Act could not be administered if the proceedings were in every case to be protracted. The questions that arise under it are often urgent, and must to a great extent be summarily dealt with. The appellants had a sufficient hearing of their case. If they thought that the corporation's statement in reply required an answer they had ample opportunity to make it, for the tribunal allowed twenty-five days to elapse after the appellants' receipt of the corporation's case before they determined the appeal.

Douglas Hogg K.C. and *Lowenthal* in support of the rules. It is not contended that the appellants are entitled to an oral hearing, but the tribunal have not given them a hearing at all. It is an essential condition of a hearing that the Court

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members of the Tribunal are Sir John Wormald, K.B.E., member of the firm of Messrs. Mather and Platt, engineers, Sir J. S. Harmood Banner, M.P., chartered accountant, Sir James Storrs, chairman of the Industrial Council for the Building Industry, and Councillor Robert

Wilson, chairman of the Resettlement Committee of the Industrial Council, who are well acquainted with the conditions pertaining to the markets for labour and materials requisite for building."

(1) [1915] A. C. 120.

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should always give "a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view": per Lord Loreburn L.C. in *Board of Education v. Rice*. (1) That passage was cited and approved by Lord Haldane and Lord Parmoor in *Local Government Board v. Arlidge*. (2) The cases of *Capel v. Child* (3) and *Reg. v. Archbishop of Canterbury* (4) are authorities that one of the essentials of a hearing consists in an opportunity of dealing with the other party's case and of explaining and doing away with the effect of the facts relied on. Here the appellants were not given a fair opportunity of dealing with the facts and reasons put forward by the corporation in support of their contention that the provision of dwelling houses would be likely to be delayed. They naturally expected that they would receive some notice from the tribunal before they proceeded to determine the appeal, and, not getting that notice, did not think there was any necessity to hasten their reply to the statement of the corporation. The principle that no man shall be deprived of his property without being heard is not limited to judicial proceedings: *Cooper v. Wandsworth Board of Works*. (5) Willes J. there said: "I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that that rule is of universal application, and founded upon the plainest principles of justice." (6) Nor is it confined to Courts of first instance. It is equally applicable to a tribunal of appeal: *Reg. v. Archbishop of Canterbury*. (4) If r. 7 meant that the Tribunal of Appeal might if they thought proper dispense with a hearing of any kind it would be ultra vires, for a rule which took away the right of appeal would not be a rule of procedure. But the other side do not contend that it does more than take away a right to an oral hearing, and therefore it becomes unnecessary to labour that point.

(1) [1911] A. C. 179, 182.

(2) [1915] A. C. 133, 141.

(3) (1832) 2 Cr. & J. 558.

(4) (1859) 1 E. & E. 545.

(5) (1863) 14 C. B. (N. S.) 180.

(6) Ibid. 190.

EARL OF READING C.J. In this case the Alhambra Picture House (Huddersfield), Ltd., obtained a rule calling on the Appeal Tribunal under the Housing (Additional Powers) Act, 1919, to show cause why a writ of certiorari should not issue to remove into this Court an order made by the tribunal dismissing an appeal, the ground upon which that rule was moved being that the applicants were not given a hearing on the appeal or allowed any opportunity of answering the statements of the local authority who were the respondents to the appeal. The question involved is of some importance, inasmuch as new powers are given to the Minister of Health, to whom is entrusted the administration of the housing policy of the Government. It was found that by reason of the attraction of labour and the provision of material for other buildings there was a difficulty in making up the shortage of dwelling accommodation, and accordingly power was given to a local authority by s. 5, sub-s. 1, of the Housing (Additional Powers) Act, 1919, to prohibit building operations where it appeared that the provision of dwelling accommodation was likely to be delayed by a deficiency of labour or materials arising out of the construction of buildings of less public importance than dwelling houses. Those are matters which the local authority have to consider before they make a prohibition order. Then, by sub-s. 2: "Any person aggrieved by an order made by a local authority under this section may, subject to rules of procedure to be made by the Minister, appeal" to the Tribunal of Appeal. In this case the applicants, who were proposing to build a picture house and restaurant, received notice that it was intended to prohibit that building. There was a hearing before the local authority, the Huddersfield Corporation, with the result that the local authority decided against the applicants, and made an order of prohibition, and against that order notice of appeal was given. The notice of appeal together with a copy of the local authority's order was in accordance with the Regulation of Building (Appeal Procedure) Rules, 1920, sent to the clerk to the Appeal Tribunal, who forwarded a copy to the local authority. On April 3 the local authority delivered their

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statement in reply to the Appeal Tribunal and also to the appellants. There the matter rested, and nothing further was done. No answer to the local authority's statement was requested by the tribunal or volunteered by the appellants, nor was any indication given by the tribunal that they proposed to decide the matter on the documents before them without hearing the parties in explanation, and on April 28 the tribunal decided that the case was of such a nature that it could properly be decided on the documents before them without an oral hearing and that the appeal should be dismissed. That is the order which it is now sought to bring up on this rule to be quashed. The tribunal have stated in an affidavit made by their chairman that their decision was arrived at after considering the notice of appeal and the reply of the local authority, and they relied on r. 7 of the Rules of Procedure, under which if the tribunal are of opinion that the case "can properly be determined without a hearing, they may dispense with a hearing, and may determine the appeal summarily." The first question is, What is the meaning of that rule? I think it means that they may dispense with an oral hearing, that the decision in *Arlidge's Case* (1) is applicable to the present, and that a hearing by the consideration of the parties' cases as stated in writing would be sufficient. But there must be a hearing, although not necessarily an oral one. In the present case I have come to the conclusion that there has not been a hearing at all. I cannot conceive that where the Legislature has given a right of appeal against an order affecting the property of one of the King's subjects a mere consideration of the written statement of his grounds of appeal together with the reply in writing of the respondent can without more be regarded as sufficient to constitute a hearing. The grounds of appeal are merely the reasons for the appeal; the facts on which it is proposed to rely in support of those reasons are not set out. The reply controverts the reasons put forward by the appellants, and states a number of facts, as facts, in answer to the appeal. Thus while the appellants state that there is no shortage of labour in the Huddersfield district

(1) [1915] A.C. 120.

and that no material required for the building of dwelling houses will be used in the reconstruction of their premises, the local authority deny the correctness of those statements, and allege in proof of the shortage of labour that on 114 houses which they, the local authority, are erecting they can only secure the services of 15 masons, whereas at least 40 ought to be employed on the work. Then they say that there is a difficulty in getting materials, particularly local wall-stones, and they go on to give further facts in considerable detail by way of disproof of the statements of the appellants. But of the truth of those facts the Appeal Tribunal has no more means of judging than any other Court, except perhaps a local Court. It might be that a local Court would have the special knowledge for the purpose of determining questions of that kind without further inquiry. But the Appeal Tribunal cannot have that knowledge, because it is not a local tribunal. It is a special appellate tribunal constituted for the whole country. Now that is all that there was before the tribunal. The tribunal had the power under r. 6 to require either the appellants or the respondents to furnish further particulars, but they did not do so. Under those circumstances I cannot think that there has been a hearing of an appeal. The principle of law applicable to such a case is well stated by Kelly C.B. in *Wood v. Wood* (1), in a passage which is cited with approval by Lord Macnaghten in *Lapointe v. l'Association, etc., de Montreal* (2), where, speaking of the committee of a mutual insurance society, the Chief Baron says: "They are bound in the exercise of their functions by the rule expressed in the maxim 'Audi alteram partem,' that no man should be condemned to consequences resulting from alleged misconduct unheard, and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals." That is the principle upon which Courts of law have acted in interfering with an improper

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(1) (1874) L. R. 9 Ex. 190.

(2) [1906] A. C. 535, 540.

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exercise of their functions by club committees and similar bodies.

Now, that being so, does that principle apply equally to the hearing of an appeal? I think it does. I see no reason why the right to a sufficient hearing should be limited to an inquiry by a tribunal of first instance. I do not mean that the extent of the right is precisely the same before both tribunals, for when the matter comes before the Appeal Tribunal there has already been a hearing before the tribunal appealed from. But, even so, I cannot think that the Appeal Tribunal is at liberty to cut down the right of appeal, that is to say, the right to have an adjudication on the subject-matter of the appeal upon the materials which the appellant desires to place before the tribunal and which are properly admissible before it. The facts here being in controversy I cannot imagine that the Appeal Tribunal accepted the facts stated by the local authority as established. The presence of Mr. Charles as chairman of the tribunal would exclude such a supposition. If I may be allowed to conjecture what happened I should assume that the tribunal came to the conclusion that the proposed work was the construction of a "luxury building" and therefore of less importance than the provision of dwelling houses, and upon that ground alone decided to dismiss the appeal. If r. 7 was intended to give the Appeal Tribunal the right to decide the matter not merely without an oral hearing but without allowing the appellants an opportunity of answering the case of their opponents, I think the Minister was exceeding his powers in making that rule, inasmuch as his powers are limited to making rules of procedure. Rules of procedure are the machinery for enforcing the right of appeal, and a rule which has the effect of taking that right away is not a rule of procedure. I would only add that in dealing with an Act of Parliament of this character one cannot fail to be impressed with the importance of giving very large powers to the local authority in order to provide the dwelling accommodation which is so much needed, and I should be sorry if this Court, in administering the law, had to give a decision which would

have the effect of delaying the operation of the Act. But in my judgment our decision does nothing of the kind. There was no reason why the Appeal Tribunal should not, within the twenty-five days that elapsed between April 3 and April 28, have given notice to the parties that they would determine the appeal on a specified day, and that if either of the parties had any further facts to bring forward or arguments to urge they should give notice of them to the tribunal. Such a notice would not have delayed the determination of the appeal. The conclusion then to which I have come is that the rules for a certiorari and for a mandamus must be made absolute.

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SHEARMAN J. I regret that I have arrived at a conclusion which is contrary to that of the majority of the Court, but I am of opinion that these rules should be discharged. The Act of 1919 by s. 5, sub-s. 1, provides that a local authority may prohibit the construction of any buildings which are of less public importance than the provision of dwelling accommodation, and the construction of which is likely to cause a deficiency of labour and materials; and by sub-s. 2 any person aggrieved by such a prohibition order may, "subject to rules of procedure to be made by the Minister," appeal to the Minister, who is to refer the matter to a special tribunal composed of five persons to be appointed by the Minister. In the present case the Huddersfield Corporation prohibited the building of a picture house under sub-s. 1, and the building owners appealed. That appeal had to be determined according to the rules of procedure. I quite agree that the authority of the Minister in that behalf was confined to making rules of procedure; he could not under the guise of rules of procedure deprive the aggrieved parties of their right of appeal. The appellants had a right to be heard. On that point I am not in any way differing from the rest of the Court. The only point on which I differ is that I think there has been in this case a hearing according to law. Now the appellants duly set out on paper and forwarded to the Appeal Tribunal the notice and grounds of their appeal, and the local authority

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in compliance with r. 5 delivered their reply. Those two documents were the only materials before the Appeal Tribunal, and for the purpose of determining whether there was under those circumstances a sufficient hearing it is necessary to consider the composition of the tribunal and the facts before them including the documents themselves. The tribunal consisted of a well-known King's counsel as chairman, a well-known engineer, a well-known chartered accountant, the chairman of the Industrial Council for the Building Industry, and the chairman of the Resettlement Committee of the Industrial Council, gentlemen who are all well acquainted with the conditions of the labour and building material markets. Then what do the two documents say? [He read the grounds of appeal.] The local authority in their reply simply put those facts in issue and restate the grounds upon which the prohibition order was made. With those documents before them the Appeal Tribunal, knowing what they did about building and about labour difficulties, and knowing that there was a very great likelihood of difficulty in getting houses built if a number of persons were employed in building a picture house in Huddersfield, came to the conclusion that it was not necessary to demand any further particulars from either party, and having considered the matter, dismissed the appeal. To my mind that was a hearing. I think the rules made by the Minister under this Act were merely rules of procedure, and as such must be taken to be written into the Act. The proceedings here were in strict accordance with those rules, and when the tribunal in the exercise of their discretion decided to act on the written statements alone of the two parties without requiring any further particulars they were giving the aggrieved party a hearing according to law.

SANKEY J. I agree with the judgment of the Lord Chief Justice. In my view it is a fundamental rule of law that no person can be deprived of his liberty or property without being heard, or being given an opportunity to be heard, before the properly constituted tribunal. A great number of cases

extending over a long period have determined this rule to be applicable to Courts of first instance. If a right of appeal is given by the Legislature this fundamental rule of law, unless expressly and clearly taken away by Act of Parliament, applies in my opinion equally to tribunals of appeal. If authority is needed for that proposition it is to be found in *Reg. v. Archbishop of Canterbury*. (1) In that case it was held that, under a statute which enacted that a curate whose licence had been revoked by the bishop might appeal to the archbishop, the archbishop was bound if requested by the curate to hear him as to the validity of the grounds of revocation, and could not, if so requested to hear, confirm or annul the revocation merely upon the statements made by the curate in his petition and the written documents referred to in that petition. Lord Campbell C.J. in giving judgment said: "The appellant here has not been heard. In his petition he denies almost everything charged against him, specifically, and asks the archbishop to appoint a time and place at which he may be heard and adduce evidence in his behalf. Without any communication with him, his judge decides against him. That was not a hearing." And Crompton J. said: "The appellant wishes to show that, on those original documents, his admissions have been misunderstood by the bishop, and wrongly acted upon: and he has a clear right to be heard for that purpose." In *Arlidge's Case* (2) it will be observed that Mr. Arlidge obtained what has been denied to the appellant in the present case. There the order of the Local Government Board which was complained of was made after a full and careful consideration of the reports of their inspector, and the evidence and documents accompanying those reports. A large number of observations and objections put forward by Mr. Arlidge's solicitors were also considered, and before a final determination was come to Mr. Arlidge was invited to place before the Board for their consideration any further statement which he might desire them to consider. That was precisely carrying out the principle enumerated by Lord Loreburn in *Board of Education v.*

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(1) 1 E. & E. 545, 559, 561.

(2) [1915] A. C. 120.

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Rice (1), where, discussing the obligations of a tribunal of this character, he says : “ They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.” Now a hearing in my view need not be an oral one, it may be on written representations. But the party against whom it is sought to make an order must have an opportunity at least of stating his case in writing and so making his defence. No power to make rules of procedure can deprive him of that right, and so far there is no difference of opinion between the members of this Court. The only point on which they differ is as to whether there has been a hearing. An Act of Parliament passed last year provided that a local authority might prohibit building operations which interfered with the provision of dwelling houses, and it also provided that a person aggrieved by a prohibition order might, subject to rules of procedure to be made by the Minister, appeal to the Minister, who was to refer the case to a standing tribunal of appeal. In pursuance of that power the Minister of Health made rules applicable to appeals, and it is r. 7 on which this case turns. It reads as follows : “ If, after considering the notice of appeal and the statement of the local authority in reply and any further particulars which may have been furnished by either party, the Appeal Tribunal are of opinion that the case is of such a nature that it can properly be determined without a hearing, they may dispense with a hearing, and may determine the appeal summarily.” It appears that the appellants proposed to build a picture house, and the local authority made an order under the statute prohibiting its construction. From that order an appeal was brought and the Tribunal of Appeal decided against the appellants. A rule nisi was then obtained for a certiorari to quash the order upon the grounds (1.) that r. 7 was ultra vires, and (2.) that no opportunity was given to the appellants of being heard or of answering the particulars

(1) [1911] A. C. 179, 182.

in the local authority's reply. After the order had been made by the local authority the appellants sent in their notice of appeal, stating their grounds of appeal. The local authority then put in their reply, in which they traversed the averments of the appellants and made further statements of fact in support of their case. On those documents as they stood there were a number of disputed questions of fact, and there the matter ended. No opportunity was given to the appellants to say whether they admitted those facts or had any explanation of them to offer. Under these circumstances the case seems to fall directly within the decision of the Queen's Bench in *Reg. v. Archbishop of Canterbury*. (1) It may well be that if the appellants had been given the opportunity they might have been able to disprove the statements of the local authority, and to show that their facts or inferences were wrong. One illustration of this was given by Mr. Hogg in his argument. A point was made by the local authority that there was a scarcity of building stone, and it was pointed out by Mr. Hogg that the appellants might have been going to use ferro-concrete and not building stone at all. It seems to me that the appellants have been deprived of their elementary right of a hearing and that the rules should be made absolute.

Rules absolute.

Solicitors for the appellants: *Rawle, Johnstone & Co., for Ramsden, Sykes & Ramsden, Huddersfield.*

Solicitor for the Tribunal of Appeal: *Solicitor to Ministry of Health.*

(1) 1 E. & E. 545.

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1920 BINNEY v. COMMISSIONERS OF INLAND REVENUE.

June 7.

-- Revenue—Excess Profits Duty—"Trade or business"—Commercial Traveller
—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), ss. 38, 39.

By s. 39 of the Finance (No. 2) Act, 1915, the trades and businesses to which excess profits duty applies are all trades or businesses carried on in the United Kingdom with certain specified exceptions "but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being a commercial traveller, or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency)":—

Held, that the term "commercial traveller" as used in the section is not limited to a person between whom and the firm for whom he travels the relation of master and servant exists.

CASE stated under s. 59 of the Taxes Management Act, 1880, and s. 45, sub-s. 5, of the Finance (No. 2) Act, 1915, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court.

At a meeting of the Commissioners held on July 11, 1917, for the purpose of hearing appeals, S. Binney (hereinafter called the appellant) appealed against assessments to excess profits duty made upon him by the Commissioners of Inland Revenue under s. 38, sub-s. 1, and s. 45, sub-s. 1, of the Finance (No. 2) Act, 1915. The duty charged under those assessments was 533*l.* and 1474*l.* in respect of two accounting periods ended December 31, 1915, and December 31, 1916, respectively.

The following facts were proved or admitted.

In and since the year 1910 the appellant had acted for the following firms or companies, The York Street Flax Spinning Co., Ltd., of Belfast, manufacturers of linen thread and shoe thread, William Paton, Ltd., of Johnstone, Scotland, manufacturers of boot and shoe laces, twines and cords, George Melville of Glasgow, manufacturer of sewing cotton threads, and The Govan Rope-Work Co., Ltd., of Glasgow, hemp and wire rope manufacturers.

The original agreement of the appellant with the York

Street Flax Spinning Co. Ltd., dated July 21, 1910, was in the form of a letter addressed to the appellant as follows :—

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"Dear Sir, We have entered into an agreement with you whereby we have engaged you and you have agreed to act as agent for the sale of our linen and shoe threads in the South-East of England inside a line drawn from Lynn through March, Huntingdon, Bedford, Buckingham, Oxford, Salisbury and Portsmouth, exclusive of London and districts, and with the exception of accounts noted herewith reserved for Mr. Pott, namely. . . . The agreement is to be for a period of twelve months from June 1, 1910, and if continued thereafter is to be terminable by three months' written notice on either side. While acting as our agent you are not to undertake any other agency for the sale of linen threads. All accounts now open or to be opened under your agency are to be remitted to us direct (as expressed on our invoice and statement forms) with the exception of such accounts as we may at any time instruct you to collect. We are to pay you a commission of 5 per cent. on all orders received direct or indirect and executed under your agency, guaranteeing you not less than 300*l.* for the first year. You are to bear 5 per cent. of all losses by bad debts under your agency. We are further to recoup your outlay in postages and telegrams."

The basis of the appellant's remuneration was a commission at various rates on all executed orders received direct or indirect through him.

The scope of the appellant's duties with the York Street Flax Spinning Co., Ltd., had been varied since the agreement was entered into by a change of area, London being included, and by various firms in certain towns previously excluded from the appellant's sphere of operations being subsequently included therein, but the scale of remuneration and other terms of the agreement remained unaltered.

No written agreement had been entered into by the appellant with the other manufacturers, but except as to the scale of commission the general terms under which the appellant worked for those other manufacturers might be taken to be

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the same as appeared in the appellant's agreement with the York Street Flax Spinning Co., Ltd.

It was not the duty of the appellant to, and in fact he did not, collect or receive money for any of the above firms or companies (including the York Street Flax Spinning Co., Ltd.).

The appellant had a room at the London offices of the York Street Flax Spinning Co., at Russia Row, E.C., where the company kept some stocks.

Messrs. William Paton, Ltd., George Melville and the Govan Rope-Work Co., Ltd., had offices in London and in other parts of England.

Since 1911 the appellant had had and still had an address at 87/9 Aldgate High Street, E.C., with a name plate "S. Binney & Co." As to this the appellant gave the following explanation. Before the end of 1911 the appellant had no office. He then considered it would be convenient to have a City address for letters and arranged with a friend who occupied offices on the second floor of 87/9, Aldgate High Street, to permit him to have letters addressed there. The name of the appellant was not put up there until the month of April, 1916, and then under the following circumstances: The appellant contemplated starting an export business to Russia in partnership with friends, which was to be carried on under the style of "S. Binney & Co.," and he accordingly arranged with the person then in occupation of the Aldgate High Street offices to permit him to exhibit that name at the entrance and also on the office door in consideration of an annual payment of 6*l*. The Russian export business was only carried on for about three months and was then abandoned, but the name of "S. Binney & Co." was not removed from the entrance or door.

No part of the profits included in the assessment was derived from the Russian export business, neither did the assessment in any way relate thereto.

At no time had the appellant used the Aldgate High Street offices except as an accommodation address for the receipt of letters. He had no seat or desk in the office, kept no stock

or books or documents there, and although that address was on his letter paper he did not write his letters there, but either from his home address or from his room at the York Street Flax Spinning Co.'s offices in Russia Row when in London, or when travelling in the country from the hotels at which he might be staying.

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Before April, 1916, the appellant paid no rent for the use of the Aldgate High Street address. A rent of 6*l.* had been paid from April, 1916, up to the date of the hearing of the appeal.

The appellant employed in connection with his work three men in London and one man in the provinces, all of whom were engaged solely in travelling to solicit orders. None of them used the address at Aldgate High Street except occasionally when letters were called for. The appellant paid the wages of his employees, his and their travelling expenses, and the postages. The appellant occasionally received instructions from his principals as to the particular towns within his district which he had to visit, and as to the dates when or number of times he was to visit those towns, but those instructions were not periodically or frequently given, the number, order and dates of the appellant's visits to the various towns being, generally speaking, left to the appellant's discretion.

Up to the end of 1916 the appellant had been for more than twelve years a member of one or another commercial travellers' association, and he ceased to be a member only owing to the withdrawal by the Government of the facilities for cheap railway travelling afforded to members.

The appellant's note paper was headed,

"S. BINNEY,
Manufacturers' Agent.

87/9, Aldgate High Street,
London, E.C.

Telephone : 10361 Central.

Linen Threads.
Shoe Threads.

Ropes.
Twines.
Etc., etc."

Seaming Threads.
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The appellant stated that the excess profits earned by him were the result of an increased turnover which was due to the fact that he had lately had London included in his district as regards the York Street Flax Spinning Co., Ltd.; that he had had to work up a connection; that he had done so successfully, and that he was now reaping the benefit thereof.

He contended that he was not liable to excess profits duty under s. 39 of the Finance (No. 2) Act, 1915, being a commercial traveller and within the express exception contained in that section.

He stated that the whole of his time was occupied in travelling all over the south and east and midlands of England as far north as but not including Manchester, and in travelling in London; that he kept no books, did no office work, and that only a small proportion of his whole time was spent at his room in the York Street Flax Spinning Co.'s offices in Russia Row in checking the commission sheets sent to him by his employers and in writing letters.

On behalf of the respondents it was contended that the business of the appellant was the business of an agent, but not of an agent "whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency"; that the assessments had been rightly made in accordance with ss. 38 and 39 of the Finance (No. 2) Act, 1915, and s. 45 of the Finance Act, 1916, and that the appellant was rightly charged therein.

The Commissioners were of opinion that the business of the appellant was that of an agent whose remuneration did not consist of a fixed and definite sum not depending on the amount of the business done or any other contingency, and that the appellant was rightly charged and they confirmed the assessments.

The case came before Sankey J. on June 26, 1918, when he made an order remitting the case to the Commissioners to state whether the appellant was a commercial traveller.

The Commissioners made additions to the case in which they stated that they held a further meeting on November 13,

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1918, and heard further argument by both sides, and the evidence of a number of witnesses on behalf of the appellant, including the appellant himself.

The evidence of the appellant's witnesses demonstrated (1.) that the appellant considered himself a commercial traveller; (2.) that the manager of the department of the York Street Flax Spinning Co. with which the appellant was concerned considered him to be a commercial traveller; (3.) that traders with whom he had dealings considered him to be a commercial traveller; (4.) that other commercial travellers who appeared before the Commissioners as expert witnesses considered him to be one of themselves; and (5.) that the term "commercial traveller" might be, and in some circumstances was, given so wide an interpretation as to be made applicable to any person who travels for commercial purposes—e.g., it was stated that one of the largest commercial travellers' associations in England admitted to its membership master manufacturers or dealers who travelled to obtain orders for goods manufactured or dealt in by themselves.

The above evidence was in the opinion of the Commissioners unshaken in cross-examination. No witnesses were called by the Crown's representative in support of his contention.

As regards the term "commercial travellers" as defined in the standard English dictionaries the appellant's contention would in the opinion of the Commissioners certainly fall under such definitions, were it not that they did not seem to contemplate a commercial traveller serving more than one master.

The Commissioners stated that they adhered to the opinion expressed in the last paragraph of the case—namely, that the business of the appellant was that of an agent whose remuneration did not consist of a fixed and definite sum not depending on the amount of the business done or any other contingency and that the appellant was rightly charged.

All commercial travellers were agents, but the Commis-

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sioners regarded the section under consideration as using the word "agent" with exclusive reference to individuals who were not within its meaning and intent "commercial travellers."

The Commissioners were of opinion that though the appellant might be a commercial traveller in the wide sense of the term, the term as used in s. 39 of the Finance (No. 2) Act, 1915, applied only to an individual between whom and his employer there existed the relation of master and servant, and they found that as between the appellant and the several persons for whom he acted there was not this relation; they therefore found that he was not a commercial traveller within the meaning of that term as used in s. 39 of the Act of 1915.

Sir W. Finlay K.C. and *Latter* for the appellant. The appellant is a commercial traveller, and therefore under s. 39 of the Finance (No. 2) Act, 1915, is not assessable to excess profits duty, as he comes within the exemption in the latter part of the section. A commercial traveller is defined in the Oxford Dictionary as "an agent for a manufacturer, wholesale trader, etc., who travels over a district showing samples and soliciting orders." The appellant on the facts comes within that definition. The fact that he travels for two or three principals does not prevent him being a commercial traveller. The suggestion that the term "commercial traveller" in s. 39 is confined to an individual between whom and his employer the relation of master and servant exists cannot be correct. It was held in *Robbins v. Inland Revenue Commissioners* (1) that a person in the position of a servant does not own or carry on a trade or business and therefore does not come within the Act at all with regard to excess profits duty. If therefore the decision of the Commissioners is correct it entirely does away with the exemption given to commercial travellers by the Act and makes those words meaningless.

Sir Gordon Hewart A.-G. and *R. P. Hills* for the Crown.

(1) [1920] 1 K. B. 51.

The appellant is not a commercial traveller within the meaning of that term as used in s. 39 of the Act of 1915. His business is that of a person taking commissions in respect of services rendered or that of an agent, and he was properly assessed to excess profits duty by the Commissioners. It might be said that any person who makes journeys for the purposes of trade is a commercial traveller, but the term is used in the Act with a much more limited meaning. It is not contended that a man ceases to be a commercial traveller because he travels for more than one commodity and for several principals. The question depends upon whether the man is an agent or whether he is a servant. There was evidence before the Commissioners upon which they could find that the appellant was an agent and not a commercial traveller. This is a question of fact. When the Commissioners find a fact and there is evidence to support that finding it is not open to this Court to question that finding: *Gramophone and Typewriter, Ltd. v. Stanley* (1); *Smith v. Incorporated Council of Law Reporting for England and Wales* (2); and *Inland Revenue Commissioners v. Maxse*. (3) There is a clear distinction between a man who travels about the country as a commercial traveller obtaining orders and living in the commercial rooms of hotels and a person in the position of the appellant who has agency agreements with various firms and who employs other persons for the purpose of carrying on an agency business. The fact that he himself makes journeys does not make him a commercial traveller as distinguished from the class of agents.

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ROWLATT J. In my judgment this appeal must succeed. The question is whether the appellant is a commercial traveller within the meaning of that word as used in s. 39 of the Finance (No. 2) Act, 1915. That section brings under liability to excess profits duty agents of any description except agents who are commercial travellers—because the words “not being a commercial traveller” have that effect

(1) [1908] 2 K. B. 89.

(2) [1914] 3 K. B. 674.

(3) [1918] 2 K. B. 715.

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—and agents on fixed terms of remuneration, if I may put it shortly, leaving liable to the duty all agents whose remuneration is not fixed. It is quite clear that a man who is a commercial traveller is exempt, although he is an agent, whatever the terms of his remuneration are. The appellant in this case regards himself as a commercial traveller; the principal firm for whom he acts regards him as a commercial traveller; the traders with whom he deals call him a commercial traveller, and apparently the persons who control commercial travellers' associations regard him as a commercial traveller; and I think dictionaries would define him as a commercial traveller. What does he do? His business is to sell the goods of other persons or to procure them to be sold. He has no establishment. He has an address, but that is immaterial for this purpose. The way he does his business is by going round the country, like other commercial travellers. In my opinion it is quite obvious that he is a commercial traveller. It is said that he employs other persons to expand his own activities, because that is what it comes to; that he employs sub-agents to do some of the work for him; but he himself spends his time on the road seeking business, and I cannot see any reason why he is not a commercial traveller. It is said on behalf of the Crown that the Commissioners have decided the contrary, and that it is a decision on a question of fact. It is fortunate that this case was sent back by Sankey J., because it might have appeared from the case as first stated that in holding that the appellant was an agent whose remuneration was not fixed the Commissioners had excluded him from the ranks of commercial travellers. The case was however sent back to the Commissioners, who adhered to their decision, but now we have the reason why they did it, and to my mind the Commissioners reveal quite clearly that they have gone wrong in point of law. They have misdirected themselves; they have applied their minds to a question to which in my opinion they had no right to apply them, because they say that although the appellant may be a commercial traveller in the wide sense of the term, the term as used in s. 39 applies only to an individual between whom and his employer there exists

the relation of master and servant. In Acts of Parliament, and especially in Taxing Acts, where it is necessary to see that the tax is clearly imposed, words in favour of the subject are to be construed in their ordinary signification unless there is some reason to the contrary. I cannot see any reason which justifies these Commissioners in stating that this term is cut down in the way they say. There is nothing on the face of the Act to justify their construction. On the other hand a commercial traveller is expressly mentioned in the Act as a class of agent. The Commissioners themselves agreed that commercial travellers are agents, and "agent" is a wider term than "servant." Further the Act is not really dealing with servants; it is dealing with persons who conduct their own businesses and not the businesses of other persons whose servants they are. I think that everything points to the conclusion that the words "commercial traveller" are used in their full sense. Anyhow there is nothing to point to the contrary, and I think the Commissioners have taken upon themselves to limit these words in a way which is not authorized and therefore have gone wrong in point of law. The appeal must be allowed.

Appeal allowed.

Solicitors for the appellant: *Oldfields.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

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Revenue—Excess Profits Duty—Foreign Company—Sale of Products to English Company—Division of Profits—Liability of Foreign Company to Excess Profits Duty in Name of English Company—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), ss. 31, 38, 39, 45—Regulations of January 6, 1916.

Sect. 31 of the Finance (No. 2) Act, 1915, contains provisions with respect to the charge of income tax on non-residents.

By sub-s. 3: "Where a non-resident person not being a British subject or a British, Indian, Dominion, or Colonial firm or company, or branch thereof, carries on business with a resident person, and it appears to the Commissioners by whom the assessment is made that, owing to the close connection between the resident and the non-resident person, and to the substantial control exercised by the non-resident over the resident, the course of business between those persons can be so arranged, and is so arranged, that the business done by the resident in pursuance of his connection with the non-resident produces to the resident either no profits or less than the ordinary profits which might be expected to arise from that business, the non-resident person shall be chargeable to income tax in the name of the resident person as if the resident person were an agent of the non-resident person."

By sub-s. 4: "Where it appears to the Commissioners by whom the assessment is made or, on any objection or appeal, to the general or special Commissioners that the true amount of the profits or gains of any non-resident person chargeable in the name of a resident person with income tax cannot in any case be readily ascertained the Commissioners may, if they think fit, assess the non-resident person on a percentage of the turnover of the business done by the non-resident person through or with the resident person in whose name he is chargeable. . . ."

By sub-s. 5: "The amount of percentage shall in each case be determined, having regard to the nature of the business, by the Commissioners by whom the assessment on the percentage basis is made, subject, in the case of an assessment made by the additional Commissioners, to objection or appeal to the general or special Commissioners" with a further appeal to a referee or board of referees.

By s. 38 and the following sections all trades and businesses of any description carried on in the United Kingdom with certain specified exceptions are made liable to excess profits duty, which duty is by s. 45 to be assessed by the Commissioners of Inland Revenue with an appeal to the general or special Commissioners.

By s. 45, sub-s. 7: "The Commissioners of Inland Revenue may make regulations with respect to the assessment and collection of the excess profits duty and the hearing of appeals under this section, and may by those regulations apply and adapt any enactments relating to the assessment and collection of income tax, or the hearing of appeals as to

income tax by the general or special Commissioners, which do not otherwise apply.”

The Commissioners of Inland Revenue made regulations dated January 6, 1916, providing (inter alia) that s. 31 of the Finance (No. 2) Act, 1915, should apply to the assessment and collection of excess profits duty and the hearing of appeals in connection therewith.

An American company who manufactured a certain razor entered into an arrangement with an English company by which it sold its razors to the English company upon terms so by which the American company should take the greater part of the difference between the cost of the articles and the price paid by the retailer to the English company. The Commissioners of Inland Revenue assessed the English company to excess profits duty as agents of the American company :—

Held, that s. 31 of the Act of 1915 could not be applied to excess profits duty so as to enlarge the scope of the duty, and that therefore the assessment was invalid.

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CASE stated under s. 45, sub-s. 5, of the Finance (No. 2) Act, 1915, and s. 59 of the Taxes Management Act, 1880, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court.

At meetings of the Commissioners held on May 1 and July 15, 1918, for the purpose of hearing appeals, the Gillette Safety Razor, Ltd., appealed against the following assessments to excess profits duty made upon them as agents of the Gillette Safety Razor Co. of Boston, U.S.A. (1.) an assessment in the sum of 23,781*l.* 12*s.* for the accounting period of twelve months ended August 31, 1916, and (2.) an assessment in the sum of 7320*l.* 12*s.* for the accounting period of four months ended December 31, 1916, made upon them by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act, 1915, Part III., and subsequent enactments.

In 1904 the Gillette Safety Razor Co. of Boston, U.S.A. (hereinafter called the Boston company), acquired the patent and all other rights of and connected with the Gillette safety razor, and, having established a business with their head office in the U.S.A., opened a branch office in The Minories, London. A Mr. Charles A. Gaines was at the time in the employ of a metal and cork seal company in London, but at another address, such company being entirely independent of the Boston company, and he became “Treasurer” of and managed the English branch of the Boston company which,

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in 1908, removed from the Minorities to 17, Holborn Viaduct. The business was that of manufacturers and vendors of Gillette razors and razor blades. The Boston company had a factory at Leicester at which they manufactured Gillette razors and razor blades.

On September 29, 1908, a company named the Gillette Safety Razor Co. of England, Ltd. (hereinafter called the English company), of 17, Holborn Viaduct, was registered in London under the Companies Acts, and by an agreement dated September 30, 1908, it purchased from the Boston company as from June 30, 1908, as a going concern, (1.) the goodwill of the business carried on at 17, Holborn Viaduct, and at Leicester, (2.) the leasehold premises at 17, Holborn Viaduct, and Leicester, (3.) all plant, machinery, stock-in-trade, etc., (4.) the benefit of all pending contracts, (5.) all other property except the British Letters Patent of the English branch of the Boston company. It was also provided by the agreement that the Boston company should grant to the English company the sole and exclusive licence to manufacture and sell in the United Kingdom safety and other razors manufactured under the letters patent for the residue of the term granted by such letters patent or any extension thereof, the licence to be subject to a reservation to the Boston company of the right to regulate from time to time the prices at which articles manufactured under the said licence could be sold to and by factors, wholesalers and dealers and to and by retailers and to require every such article to bear a label containing the conditions as to prices from time to time imposed, and to such other reservations and upon and subject to such royalties, terms and conditions as might be reasonably imposed by the Boston company.

The nominal capital of the English company was 20,000*l.* divided into 2000 shares of 10*l.* each, of which the Boston company was allotted 1700 fully paid up shares of 10*l.* each as part consideration for the above-mentioned transfer of its business. Mr. Gaines held ten shares in the English company of which he was a director. In 1909 he was made managing director and received twenty additional shares, the nominal

capital of the company being increased in that year to 100,000*l.* of which 60,000*l.* was allotted to and stood in the name of the Boston company, the remaining 40,000*l.* being subscribed for and allotted by other shareholders.

In 1912 it was thought desirable that an American company should be formed and the business should be carried on by it, and accordingly the English company went into voluntary liquidation on August 3, 1912, and was finally wound up on October 6, 1913.

On September 2, 1912, the Gillette Safety Razor, *Ld.*, of Massachusetts, U.S.A. (hereinafter called the U.S.A. company), was registered with a nominal capital of 400,000 dollars. The greater part of the shares represented by such capital was owned and held by the Boston company. The majority of the directors of the U.S.A. company were directors of the Boston company. One of the objects of the U.S.A. company was to acquire all assets and rights of the English company then in liquidation, an object which was attained, being sanctioned by an order of the High Court of Justice dated July 1, 1913.

Mr. Gaines was appointed manager at a salary of 3000*l.* per annum of the English branch of the U.S.A. company, of which company he was made a director in February, 1913. He went to America at certain times, and at one time was general manager of the Boston company.

The business in the United Kingdom so acquired by the U.S.A. company from the English company was carried on in the United Kingdom by the U.S.A. company from its formation down to August, 1915, when, owing to the war, it decided to close its business and filed a statutory notice dated August 25, 1915, of its intention to cease to carry on business in the United Kingdom. Pursuant to this decision it terminated Mr. Gaines' engagement as manager. Mr. Gaines then decided to promote an English company which should carry on in the United Kingdom the sale of Gillette razors, etc. To this end he obtained from the Boston company in consideration of a payment of 2000*l.* the right to use the word "Gillette," and on August 25, 1915, the Gillette Safety

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Razor, Ltd. (hereinafter called the appellant company), was registered in London under the Companies Acts as a private limited liability company with a nominal capital of 6000*l.* divided into 600 shares of 10*l.* each of which 500 were allotted to Mr. Gaines, who was a promoter and chairman of the directors of the company.

Negotiations took place between the Boston company and the appellant company with a view to arriving at an agreement as to the terms on which the former should supply and the latter should obtain Gillette safety razor outfits and blades for sale by the latter in the United Kingdom and British colonies. An agreement was provisionally arrived at and signed by the sales manager on behalf of the Boston company and by Mr. Gaines on behalf of the appellant company which agreement was in the form of a letter to Mr. Gaines by the sales manager and was as follows :—

“ Dear Sir, In reply to your request that we supply you with Gillette safety razors and blades for resale in Great Britain we propose to sell you at the prices and discounts, and upon the terms as to their resale by you as hereinafter stated and subject to the conditions, limitations and licence restrictions as shown upon the licence labels affixed to each carton in which each razor set or package of blades are contained.

“ 1. *Prices.* You as buyer will purchase from us at the following prices and discounts razors at the list prices fixed by us less a discount of 50% from such list prices. Blades at the list prices fixed by us less a discount of 45% from such list prices.

“ 2. *Terms.* 90 days nett cash, all invoices payable in N.Y. or Boston exchange. Deliveries f.o.b. Boston all carrying charges by you.

“ 3. *Insurance.* All shipments are to be made at your risk, the insurance will not be taken out by us except on your special instructions, and then only with the understanding that you will pay the premium for such insurance.

“ 4. *Orders.* Your orders for stock to be in as large quantities as you can consistently order but not less than 500 razors

or one standard case of blades 6250-12's or one standard case of 8 cu.-ft. of razors and blades assorted.

" 5. *Stock.* You are to carry a sufficient stock of Gillette razors and blades at all times as will enable you without delay to fill all reasonable orders received from your trade.

" 6. *Trade Supply.* You are to supply the wholesalers and retailers in Great Britain, who will maintain the resale prices and other conditions herein imposed.

" 7. *Handling Other Razors.* During the life of this agreement you are not to engage in the sale of any other safety razor or blades which is an imitation or infringement of the Gillette type without first obtaining our permission in writing.

" 8. *Price Maintenance.* You are to use your utmost endeavour to sell Gillette razors and blades and to thoroughly organize the trade in your territory and refuse to sell to any person or firm who does not maintain your resale prices.

" 9. *Supervision of Territory.* We reserve the right to appoint representatives to travel in and call on the trade in the territory covered by this agreement.

" 10. *Advertising.* We agree to advertise Gillette safety razors and blades in your territory to such extent and in such publications as in our judgment may be for our best interest, you are to furnish and supply such printed matter, show cards, or other advertising material that is considered necessary.

" 11. *Resale.* You are to resell to your trade f.o.r. your warehouses or branches, carriage and duty paid as hereinafter provided, and no allowance, rebate, bonus, or other consideration is to be allowed by you whereby the ultimate net prices to your customers shall be lower than herein provided.

" 12. *Territory.* This agreement covers the sale of Gillette razors and blades in Great Britain, British South Africa, Australasia, Norway, Sweden, Denmark, Belgium, Holland, Switzerland, Spain, Portugal and Italy, provided however that we reserve the right to sell direct in any and all of this territory should you in our opinion fail to satisfy the trade demands as set forth in this agreement.

" 13. *Protection of Territory.* All orders or inquiries which we receive for Gillette razors and blades from this territory

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will be referred to you. If for any reason other than the compliance with our terms as herein above set forth such orders or inquiries are not filled by you we reserve the right to fill such orders direct, but only at the price, discount and quantity requirements, at which you are to resell and as set forth in our Schedule A resale prices attached and made a part hereof. It is understood that if sales are made by importers, jobbers or others in the above-described territory without our knowledge or consent we shall be held harmless and not accountable to you for damages by reason of such sales.

" 14. *Minimum Quantities purchased.* You are to purchase from us for resale in your territory a minimum quantity of 50,000 razors annually and a sufficient quantity of blades to meet the reasonable demands of your trade. If within the life of this agreement or an extension thereof you do not within each period of 12 months purchase said minimum quantity of 50,000 razors then and in that event we reserve the option of cancelling this agreement by giving you thirty days' notice by registered post of our intention to cancel and determine the same and at the expiration of the term fixed in said notice this agreement shall be absolutely determined.

" 15. *Agency Duration.* This agreement shall be effective on and after the first day of September, 1915, and shall continue in force for two years from that date unless sooner terminated by a breach thereof or by mutual consent. It can be renewable thereafter from year to year but only by a written consent of the parties hereto.

"Your acceptance of this agreement signified by your signature below is to constitute an agreement between us when same has been duly approved by the Executive Committee of the Gillette Safety Razor Co. at Boston."

This agreement never became legally binding as it was never formally approved by the executive committee of the Boston company, but it had in fact formed the basis on which all trading transactions had since taken place between the appellant company and the Boston company.

When the U.S.A. company closed its business it had at the factory at Leicester a stock of goods valued at 56,000*l*. The appellant company by arrangement was allowed to treat this stock as goods supplied under the terms of the last-mentioned agreement. The appellant company temporarily took over the factory at Leicester for use as a store at a rent after the rate of 400*l*. per annum, and it also took over the lease of the Holborn Viaduct premises. The appellant company moved out of the Leicester factory in January, 1916, upon which it was disposed of by the U.S.A. company. The appellant company opened its offices in Great Portland Street in October, 1915, as the Holborn Viaduct premises were not suited to the company's purposes. These premises were for a time a burden to the appellant company, but the lease thereof was surrendered in 1917.

There was in Canada a company named the Gillette Safety Razor of Canada, Ltd. (hereinafter called the Canadian company), which was intimately connected with the Boston company. Between 80 per cent. and 90 per cent. of the shares in the Canadian company were owned by the Boston company, and three directors of the Boston company were directors of the Canadian company. The Canadian company obtained the bulk of the materials it required for manufacture of its goods in Canada (steel, copper, leather, etc.) from or through the Boston company.

The U.S.A. company sold in the United Kingdom Gillette goods manufactured by itself at Leicester as well as Gillette goods imported from Canada and the United States of America.

The appellant company was not at liberty to manufacture Gillette goods in the United Kingdom and had not done so. Under clause 7 of the agreement they were not during the life of the agreement to engage in the sale of any other safety razor or blades which was an imitation or infringement of the Gillette type without first obtaining the permission of the Boston company in writing. Apart from the stock already in the United Kingdom the appellant company had in fact obtained all their supplies from the Boston

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company or from the Canadian company through the Boston company.

All orders for goods were sent by the appellant company to the Boston company, though the goods might be supplied direct to the appellant company by the Canadian company. Occasionally in sending an order the appellant company had stipulated for Canadian made goods, but even in that case the orders were sent to the Boston company, to which company also payment was invariably made for all goods supplied. Payment for the stock of goods at Leicester taken over from the U.S.A. company was made to the Boston company. The Canadian company always was in debt to the Boston company and when the Boston company received payment for goods supplied by the Canadian company the amounts so received were applied to reduction of the said indebtedness.

The Boston company's invoices continued to include London in the list of places at which that company had offices and factories, but it was stated by the officials of the appellant company that the Boston company had not now any office in London, Paris or Montreal and that such names ought to have been blocked out. It was admitted by the appellant company that the Boston company had no connection with any premises in London apart from the appellants' own premises.

The invoice price of Gillette goods sold by the Boston and Canadian companies included delivery on board, but not freight or insurance. These matters were arranged by the Boston company or the Canadian company as the case might be on behalf of the appellant company, the cost being debited to the appellant company.

The Boston company were at liberty to supply their goods and did in fact supply them to other persons in the territory of the appellant company—namely, in the United Kingdom and British colonies.

The accounts of the appellant company showed that at December 31, 1916, its stock in hand was valued at 65,620*l.*; that while on the one hand it owed to creditors the sum of 124,637*l.* it had at the same time 56,037*l.* in its bankers'

hands; that in sixteen months its sales amounted to 260,523*l.*, and that its gross profit out of which all working expenses had to be defrayed amounted to 6.37 per cent. of the sales. The 124,637*l.* was all owing to the Boston company, and the 56,037*l.* was left in the hands of the appellant company's bankers with the approval and pursuant to the wishes of the Boston company

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The appellant company sent to the Boston company a monthly statement relative to trading in the United Kingdom showing the amount of stock at the beginning and end of the month and the purchases and sales during the month. The terms of payment by the appellant company were sufficiently elastic to permit of goods purchased by them being sold in the United Kingdom before payment was made for them to the Boston company.

The Commissioners were satisfied that, as a result of the arrangements aforesaid between the appellant company and the Boston company, the appellant company was substantially controlled by the Boston company, and that the financial arrangements between the two companies were such that the appellant company carried on trade in the United Kingdom to an extent and in a manner which would not otherwise be possible.

It was contended on behalf of the appellant company (1.) that the appellant company was not within s. 31 of the Finance (No. 2) Act, 1915, at all, (2.) that the facts did not bring the appellant company within the section, (3.) that the section had no application to excess profits duty, (4.) that if it had, the pre-war standard could not be a percentage standard.

On behalf of the Commissioners of Inland Revenue it was contended that the case was within the scope of s. 31 of the Finance (No. 2) Act, 1915.

The Commissioners were asked in the first instance to give a ruling on this point, as it would not be necessary to consider the question of figures if the Commissioners sustained the appellant company's contention.

Having considered the matter the Commissioners came to the conclusion that owing to the close connection between

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the appellant company and the Boston company and to the substantial control exercised by the Boston company over the appellant company, the course of business between the two companies was so arranged that the business done by the appellant company in pursuance of its connection with the Boston company produced to the appellant company less than the ordinary profits which might be expected to arise from that business, and that the case was within the scope of s. 31 of the Finance (No. 2) Act, 1915.

The appellant company then suggested in order to save delay and expense that the Commissioners would compute the appellant company's liability upon hypothetical figures and so enable the appellant company to obtain the opinion of the High Court on the point of law involved, on the understanding that if the High Court decided in favour of the Revenue an opportunity should afterwards be afforded the appellant company of furnishing any figures that might be needed. On behalf of the Commissioners of Inland Revenue no objection was raised to this proposal, and the Commissioners therefore acted upon it.

The Commissioners said that as they construed s. 31, sub-s. 4, of the Finance (No. 2) Act, 1915, the duty was thrown upon them of deciding to the best of their judgment what percentage of the turnover should be taken in order to arrive at the ordinary profits which might be expected to arise from the business carried on by the appellant company.

The Commissioners considered that the mere name of the Gillette safety razor would insure a large sale, and they thought that on that account the Boston company could dispose of its goods to dealers in the United Kingdom, apart from any special understandings or arrangements, on terms which would yield to the trader in the United Kingdom a smaller percentage of gross profit than would have to be conceded by the makers of any other safety razor. Taking this factor into account they considered $12\frac{1}{2}$ to be a fair and reasonable percentage to adopt, and they so computed the liability on the basis of the figures taken from the appellant company's profit and loss account or balance sheet as follows :—

	£	£	1920
16 months' sales		260,523	GILLETTE SAFETY RAZOR v. INLAND REVENUE COMMIS- SIONERS.
16 months' purchases	309,546		
Less stock in hand	65,620		
Cost of goods sold		243,926	
Gross profits per account		£16,597	

The Commissioners estimated the ordinary profits which might be expected to arise from the business carried on by the appellant company at 12½ per cent. gross on sale price. On this basis

	£
The profit (gross) for 16 months	= 32,564
Profit (gross) per accounts as above	= 16,597
Balance for 16 months ..	£15,967
£15,967 for 16 months	= £11,975 for 12 months.
	£3992 for 4 months.

The Commissioners estimated the cost price of stock in hand at 20 per cent. of the net invoiced price of 65,620*l.*, i.e., 13,124*l.*, and they found that 13,124*l.* was the amount of capital employed by the non-resident person in the business carried on in the United Kingdom by the resident persons.

13,124*l.* @ 6 per cent. gave 788*l.* as the pre-war standard for 12 months and 263*l.* as the pre-war standard for 4 months. Adding 200*l.* per annum to the above figures under s. 38, sub-s. 1, of the Finance (No. 2) Act, 1915, the Commissioners got 988*l.* and 329*l.* respectively for 12 months and 4 months.

The position then stood as under :—

	12 months		4 months	
	£	s.	£	s.
Profits of accounting periods ..	11,975	0	3992	0
Pre-war standard, etc.	988	0	329	0
	£10,987	0	£3663	0
60 per cent. ..	£6592	4	£2197	16

The determination of the Commissioners was that the

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charge of 23,781*l.* 12*s.* should be reduced to 6592*l.* 4*s.*, and the charge of 7320*l.* 12*s.* to 2197*l.* 16*s.*

The appellant company declared their dissatisfaction with the determination of the Commissioners and required them to state a case.

The only questions for the determination of the Court were whether s. 31 of the Finance (No. 2) Act, 1915, applied to excess profits duty, and whether there was evidence upon which the Commissioners could find that the appellant company came within s. 31 of the Act of 1915.

Disturnell K.C. and *Edwardes Jones* for the appellants. The decision of the Commissioners was wrong. Sect. 31 of the Finance (No. 2) Act, 1915, does not apply to, nor does it affect liability to, excess profits duty ; it is included in Part II. of the Act which relates only to income tax, and cannot be made applicable to excess profits duty by regulations which the Commissioners of Inland Revenue have purported to make under s. 47, sub-s. 5. The Commissioners are thereby seeking to enlarge the liability to excess profits duty. That duty is created by s. 38 and the charge cannot be enlarged by s. 31 of the Act of 1915, which amends s. 41 of the Income Tax Act, 1842, a section dealing only with the machinery for assessment and collection of income tax. Sect. 31, sub-s. 3, contemplates the case of a resident who carries on business in his own name but who by virtue of an agreement with a non-resident person makes less profits than he would otherwise have done, the non-resident keeping most of the profit. The section provides that in that case the non-resident shall be assessable to income tax in the name of the resident. Under s. 31, sub-s. 5, the assessment is to be made by the Commissioners subject to an appeal to the General or Special Commissioners with a final appeal to a board of referees, whereas excess profits duty is under s. 45, sub-s. 5, to be assessed by the Commissioners of Inland Revenue, a totally different body, with an appeal to the General Commissioners. The two sets of machinery apply to different subject-matters and are quite inconsistent when applied to the same subject-matter.

This shows that s. 31 cannot be applied to the excess profits duty. The profits for excess profits duty have to be computed according to the provisions contained in the Fourth Schedule of the Act. That computation is different in many respects from the computation of profits for the purpose of income tax. There being no pre-war standard of profits in this case it was necessary to proceed on a percentage on the capital of the business, but there is no provision in s. 31 for ascertaining the capital of a business.

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Sir Gordon Hewart A.-G. and *R. P. Hills* for the respondent. This is a case which s. 31, sub-s. 3, of the Act of 1915 was designed to meet so far as regards income tax. Looking at the substance and not at the form of the arrangement the business is not the business of the resident but of the non-resident, and the Act provides that in that case the non-resident shall be chargeable to income tax in the name of the resident. If it is fair that a non-resident should be chargeable to income tax in the name of a resident there is no reason why he should not also be liable to excess profits duty in the name of a resident. Parliament has in fact so provided because s. 45, sub-s. 7, of the Act of 1915 provides that "the Commissioners may make regulations with respect to the assessment and collection of the excess profits duty and the hearing of appeals under this section, and may by those regulations apply and adapt any enactments relating to the assessment and collection of income tax, or the hearing of appeals as to income tax by the General or Special Commissioners, which do not otherwise apply." The Commissioners of Inland Revenue may therefore say that they will treat a business for the purposes of excess profits duty exactly the same as if they were dealing with income tax. The Commissioners have made regulations applying s. 31 to the assessment and collection of excess profits duty. Therefore the assessment to excess profits duty was properly made upon the resident person as agent for the non-resident upon the true profits of the business and not upon the resident only upon the nominal profits. It does not follow because

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the Commissioners did not adapt s. 31 by excluding sub-s. 5 with regard to the procedure on appeals that therefore s. 31 does not apply to excess profits duty.

Disturnal K.C. replied.

ROWLATT J. In this case the appellant company have been assessed as agents for a company which has been referred to and which I shall refer to as the Boston company, carrying on business in the United States. The arrangement between the parties may be stated in two or three sentences. The appellants are not agents of the Boston company; the relationship of principal and agent does not exist between them. If they are popularly called the agency of the Boston company it is only in the sense in which in commerce a place of business which lays itself out always to have a supply by arrangement of the goods of a particular manufacturer which it sells itself as principal is sometimes called an agency, but there is no relation of principal and agent between the parties. The relation is this: The Boston company are manufacturers of a very special razor, the Gillette razor. They desire to put it upon the English market—I neglect the earlier arrangements which were made—and they are in a position to say to the appellants in England that they will supply them with these articles, if the appellants like to sell them, upon such terms that the appellants will only be able to make a small profit whereas the Boston company will make a large profit. In truth the whole profit to be made out of the article is the difference between what it costs to make and convey it to the retailer and what is paid for it by the retailer. The Boston company are in a position to say to anybody whom they make their consignee of razors over here that the terms shall be so arranged between them that by far the greater portion of that difference is the profit which the Boston company make when they sell to the consignees, and not the profit which the consignees make when they sell to the retailer. That is what it comes to, but it is perfectly obvious that according to the truth of the facts, and not according to the appearance of the facts, the appellants are in point of law nothing but

purchasers from the Boston company, and when they sell to the retail trade here they are nothing but principals in the same way.

In those circumstances it is abundantly clear that under the income tax law as it existed before 1915 no assessment could be laid upon the appellants as agents for the Boston company at all, but now they have been assessed both to income tax and to excess profits duty under a change of law which was brought about in 1915, and the point which comes before me for decision is whether they can be properly assessed to excess profits duty. That duty is laid upon the subject by Part III. of the Finance (No. 2) Act, 1915. The charge is made by s. 39 in effect upon all trades and businesses carried on in the United Kingdom, or owned or carried on in any other places by persons ordinarily resident in the United Kingdom. The charge therefore is laid upon a trade or business carried on in the United Kingdom.

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Now it is abundantly clear upon the facts that the Boston company do not carry on business in the United Kingdom. They do business with the appellant company as vendees, although they are vendees over whom the Boston company have very great control and from whom they are able to extract very remunerative terms, but the Boston company do not do business here, and there is nothing in Part III. of the Act of 1915 which expressly charges them with excess profits duty. But the assessment has been supported by the Special Commissioners upon the ground that a provision in another part of the Act—namely, that part which amends the income tax law—has been applied to excess profits duty by regulation of the Commissioners under the authority of s. 45 of Part III. of the Act. The provision which it is said has been applied is to be found in s. 31, sub-s. 3, and the following sub-sections. Sect. 31 by sub-s. 1 extends somewhat the chargeability of a non-resident in the name of any branch or manager as well as in the name of any factor, agent or receiver, and adds to the cases by which, in sub-s. 1 (b), a non-resident can be charged in the name of the branch, factor or agent. Sub-s. 2 also qualifies the way in which he is charged, but

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sub-s. 3 introduces a remarkable extension of the scope of the income tax, because it provides that a person in the position of the appellant company, although he is not an agent, may nevertheless be charged as if he were an agent. I do not read the sub-sections at length because I have already detailed my view of the position of the appellants. That is the result of sub-s. 3. It makes the appellants chargeable to income tax as if they were agents although they are not agents. This section is, as I have already said, in Part II. of the Act which deals with income tax; it is not in Part III. of the Act which deals with excess profits duty. It deals with income tax and it goes on to deal with the matter on an income tax footing so far as the machinery is concerned, because by sub-s. 4 it is assumed that the Income Tax Commissioners, not the Commissioners of Inland Revenue, will make the assessment, and an appeal lies from them to the General or Special Commissioners with, under sub-s. 5, a further appeal to a board of referees. That is what this group of sub-sections did by way of enlarging the income tax so as to hit the appellants for income tax.

It is now said that in some way or other that section can be used to make the appellants also liable to excess profits duty, and for that purpose one has to look at s. 45 of the Act of 1915 which is in Part III. of the Act. That section is dealing with the machinery with regard to excess profits duty. Sub-s. 1 says that the excess profits duty shall be assessed by the Commissioners of Inland Revenue. The matter was so delicate that no less persons than the Commissioners of Inland Revenue were to assess it. It is assessed upon any person owning or carrying on a trade, and it is to be recoverable as a debt. There are provisions for a case where a company is wound up, and by sub-s. 5 there is an appeal to the General or to the Special Commissioners from the assessment by the Inland Revenue Commissioners. There is a provision for a statement of the case to be brought in, and by sub-s. 6 the duty is to be paid notwithstanding an appeal. As we get towards the end of the section sub-s. 7 says this: "The Commissioners of Inland Revenue may

make regulations with respect to the assessment and collection of the excess profits duty and the hearing of appeals under this section, and may by those regulations apply and adapt any enactments relating to the assessment and collection of income tax, or the hearing of appeals as to income tax by the General or Special Commissioners, which do not otherwise apply." The Commissioners have made regulations, and under sub-s. 7 they have purported to apply s. 31 so as to bring in not only the machinery relating to assessment and collection, but also to bring in the enlargement of the scope of the income tax so as also to enlarge the scope of the excess profits duty, because they have said that they will now treat these appellants, who are not agents, as if they were agents and as taxable in respect of a notional business which is not carried on in the United Kingdom, and therefore is not within s. 39 of the Act, or any provision in the excess profits duty part of the Act. I do not think that can be done.

The Attorney-General has argued that there is no reason why it should not be done, but I am not concerned to go into that. The way he supported or attempted to support the decision of the Commissioners was by treating sub-s. 3 of s. 31 as a section which did not enlarge the scope of the tax but enabled the authority to get at the true profit. I speak with great respect of anything which the Attorney-General said, but he was suffering himself to lapse into popular language. Sub-s. 3 is not aimed at sham transactions so as to enable the Revenue to get at the truth of the transaction ; it enlarges the scope of the tax so as to enable the Revenue to get at a different order of real transactions, which it may be said from the point of view of taxation and economics are on the same footing as the ordinary transactions originally taxed, and it is idle to say that it enables the Revenue to get at the real profits. It does not; it enables the Revenue to get at some other profits, and therefore I do not think there is anything in s. 45, sub-s. 7, which enables the Commissioners with such effect to apply s. 31. And when you look at the section it will not work when they do apply it, at least it will

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not work as it has been applied in this case, because for the purpose of the excess profits duty it is necessary to take not merely one year's profits, but two years' profits—one, the pre-war standard of profits, and the other the profits of the year of account—and compare them. Under the Income Tax Act you have only to ascertain the profits of the year of assessment or the series of years which you take by an average, but the machinery of the excess profits duty cannot be worked in this way. In the particular case there was no pre-war trading at all by the appellants; they did not exist then, therefore there could be no pre-war standard. If there had been a pre-war standard it might have been just, if this section had been brought in, to say "you shall guess at the pre-war profits just as you guess at the profits of the accounting period," but there is nothing to be found in s. 31 or in any other section to indicate in the faintest way that you are to take a double estimate of this kind upon the turnover for the purpose of two years. The whole thing seems to me not to be workable. When there is no pre-war standard what is to be done? It seems to me that the most arbitrary thing has been done in this case. The Special Commissioners have taken the stock in hand, it may be more, it may be less, than the stock sold during the year, it happens to be much less, and they then estimated the cost price of that stock and said that that shall be the amount of capital engaged in this business. They then compared a percentage of that amount of capital with the estimated amount of profits on the sales less the amount of profits shown on the accounts. I desire to speak with moderation, but it seems to me that this is arbitrary taxation gone mad, and it only shows to what straits the Revenue are reduced when they seek to apply s. 31 in a case where it is not applicable. But apart from that, if s. 31 is applied why is it not all applied? The regulation says that the section is applied. If it is all applied what is applied is a system which involves assessment by the additional Commissioners in the ordinary way with an appeal to the General or Special Commissioners and with a further appeal to the referees.

Purporting to apply the whole of s. 31 the Inland Revenue Commissioners say they apply it so to keep the assessment in their own hands with an appeal to the Special or General Commissioners, putting on one side altogether the appeal to the referees. It seems to me that the whole thing is misconceived and that the appeal of the appellants must be allowed and the assessment vacated.

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Appeal allowed.

Solicitor for the appellants : *Newton G. Driver.*

Solicitor for the Crown : *Solicitor of Inland Revenue.*

R. F. S.

CROOK v. PRITCHARD.

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June 9.

Profiteering—Complaint of—Communication of Committee's Decision to Respondent—Regulations under Profiteering Act, 1919—Regulation 24.

Where a complaint of an overcharge is made to a local committee under the Profiteering Act, 1919, and the committee decide to prosecute the respondent, the communication in writing to the respondent of that decision under Regulation 24 is not a condition precedent to the validity of the prosecution.

CASE stated by justices of Walsall.

On January 9, 1920, a complaint was made by Elaine Goode to the local committee appointed by the Board of Trade under the Profiteering Act, 1919, for the borough of Walsall that Alfred Pritchard sought to obtain a profit on an offer by him for the sale to her of an overcoat for the sum of 5*l.* 5*s.* which was unreasonable, contrary to the provisions of the said Act. The committee heard the complaint and decided (1.) that the profit sought was unreasonable, and that the price which would yield a reasonable profit was 4*l.* 12*s.* 9*d.* ; (2.) that the seller should repay to the complainant a sum of 10*s.* which had been paid by her as a deposit ; and (3.) that proceedings should be taken against the seller before

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a Court of summary jurisdiction. On January 10, notice in writing of those portions of the committee's decision which related to the unreasonableness of the profit sought and to the order to repay the deposit was given to the respondent, but the notice contained no reference to the decision of the committee to prosecute him.

On February 11, 1920, an information was laid by the clerk of the committee against the respondent charging him with having sought to obtain an unreasonable profit contrary to s. 1 of the Profiteering Act, 1919. On behalf of the respondent a preliminary objection was taken that the proceedings were irregular in consequence of the omission of the committee to give notice in writing to the respondent of their decision to prosecute him as required by Regulation 24 of the Regulations under the Profiteering Act. (1) The justices upheld the objection and dismissed the information. The prosecutor appealed.

E. W. Cave for the appellant. The object of Regulation 24 in requiring the decision of the committee to be forthwith communicated to the respondent is to allow of his giving notice of appeal, which has to be given within three days. But he has no right to appeal against the decision of the committee to prosecute him, therefore there is no object in giving him notice of that part of their decision. Regulation 24

(1) By Regulation 22 of the Regulations made under the Profiteering Act, 1919: "If upon the hearing of the complaint the local committee are satisfied that a profit has been made or has been sought on the sale or offer for sale of an article which is, in view of all the circumstances, unreasonable, the local committee shall declare the price which would yield a reasonable profit, and shall require the seller to repay to the complainant any amount paid by the complainant in excess of such price, and they may take proceedings against the seller before a Court of summary jurisdiction."

Regulation 24: "The decision of the local committee upon a complaint shall be forthwith communicated in writing by the local committee to the complainant and to the respondent."

Regulation 25: "Any seller aggrieved by any order or decision of the local committee other than a decision to take proceedings before a Court of summary jurisdiction may appeal to the appeal tribunal in the area . . . not later than three clear days after the decision in writing of the local committee shall have been delivered to the complainant and respondent."

was only intended to apply to those parts of the decision which are appealable. But whether or not that regulation was intended to apply to the decision to take proceedings before the justices, that regulation is only directory, it is not a condition precedent to the taking of the proceedings.

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Disturnal K.C. and R. A. Willes for the respondent. What, under Regulation 24, is to be communicated to the respondent is the "decision," that is to say the whole decision of the committee, including the decision to prosecute. No doubt there is no right of appeal from that part of the decision, but the respondent's mind, when he is considering whether he shall appeal against the other parts of the decision, will be materially influenced by the knowledge that he is going to be prosecuted. It might not be worth his while to appeal so long as the only effect of the committee's decision was the obligation to repay the small excess profit he had made, but it would be quite another matter if proceedings were going to be taken which might result in a fine of 200*l.* or imprisonment for three months as provided by s. 1, sub-s. (2), of the Act. There is therefore good reason for requiring that Regulation 24 should be strictly complied with before proceedings are taken before the Court of summary jurisdiction. Non-compliance deprives that Court of the power to entertain the case.

Cave in reply.

EARL OF READING C.J. In my judgment this appeal must be allowed and the case must be remitted to the justices. Complaint was made to the local committee appointed for the borough of Walsall under the Profiteering Act, 1919, that the respondent had sought to obtain an unreasonable profit from the complainant on the sale to her of an overcoat. The complaint was inquired into and the committee came to the conclusion that the price proposed to be charged was in excess of what was reasonable, and they ordered the respondent to repay to her a sum of 10*s.* With that part of the committee's decision we are not concerned. But under Regulation 22, if the local committee are satisfied that an

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unreasonable profit has been sought they may, in addition to a declaration of the proper price and an order on the seller to repay any sum paid in excess of such price, take proceedings against the seller before a Court of summary jurisdiction. Regulation 24 requires that: "The decision of the local committee upon a complaint shall be forthwith communicated in writing by the local committee to the complainant and to the respondent." Here the objection is taken by the respondent that the notice given to him of the decision of the committee was confined to that portion of the decision which declared the proper price and ordered him to repay the excess, and said nothing about their decision to take criminal proceedings, and it is contended that the omission to give the respondent notice of that latter decision is a good answer to the prosecution. I think that contention is wrong. I am inclined to agree with the counsel for the respondent that the whole of the decision of the committee ought to be communicated to the respondent, including the decision to prosecute, where such a step has been decided on. But I do not agree that such communication is a condition precedent to the prosecution. In my opinion Regulation 24 is directory only. Indeed I can see no reason why it should be regarded as a condition precedent. There is nothing in the language of the regulations to suggest that it is so. The reason for requiring notice to be given to the respondent of that part of the decision which is other than a decision to take proceedings before a Court of summary jurisdiction is that there is a right of appeal to the Appeal Tribunal under Regulation 25 against that part of the decision, whereas there is no right of appeal against the decision to prosecute. Moreover the decision is to be communicated to the complainant as well as to the respondent, and if such communication to the respondent is a condition precedent to a prosecution, the communication to the complainant must equally be so, and that is an impossible conclusion, for the complainant is not in any way concerned with the prosecution. The Board of Trade or the local committee are alone entitled to prosecute.

SHEARMAN J. I am of the same opinion. Upon the true construction of the regulations I think that a strict compliance with Regulation 24 is not a condition precedent to the right to prosecute.

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SANKEY J. I agree for the reasons given by my Lord that compliance with Regulation 24 is not a condition precedent to the prosecution. In my opinion that regulation is only directory.

Appeal allowed.

Solicitors for the appellant: *Cunliffe, Blake & Mossman, for Town Clerk, Walsall.*

Solicitors for the respondent: *Ward, Bowie & Co, for J. F. Addison & Cooper, Walsall.*

J. F. C.

JONES, APPELLANT v. GUARDIANS OF NEWTOWN AND LLANIDLOES, RESPONDENTS.

1920
June 8.

Lunacy—Pauper Lunatic—Desertion of Husband by Wife—Subsequent Lunacy of Wife—Liability of Husband to pay for her Maintenance in Asylum—Poor Law Amendment Act, 1850 (13 & 14 Vict. c. 101), s. 5.

Where a wife leaves her husband without justification his obligation to support her is, except where she has been guilty of adultery, not put an end to, but only suspended so long as she continues wilfully to absent herself, and if during her absence she becomes a lunatic then, as she is no longer capable of volition, her continued absence is not wilful, and her husband's liability to maintain her will revive.

CASE stated by justices of the county of Montgomery.

A complaint was preferred by the respondents under s. 5 of the Poor Law Amendment Act, 1850, against the appellant, William Jones, calling upon him to show cause why he should not be ordered to maintain or contribute to the maintenance of his wife, Margaret Jones, who was a pauper lunatic and was being maintained in the county asylum at the expense of the union.

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It appeared that the appellant was married in the year 1888 or 1889. About six or seven years after the marriage his wife left him of her own accord, and from that date down to the time of her lunacy, except for a period of about five weeks in the year 1896, she absented herself from his house and refused to return to him. There was no evidence as to the reasons for which she left him, but it was admitted for the purposes of the case that she did so, and continued to remain absent, without any good cause or excuse. There was no suggestion that she had at any time been guilty of adultery. In July, 1919, she became insane and was removed to the county asylum at Bicton where she was thenceforward maintained. On February 9, 1920, the respondents took these proceedings against the appellant. The justices made an order that he should pay to the respondents the sum of 15s. 9d. per week from the date when his wife became chargeable as a lunatic.

Langman for the appellant. The obligation of a husband to pay for the maintenance of his wife who has become chargeable to the union must be precisely the same whether she is a lunatic or sane, and the circumstances which would relieve him from the obligation to maintain her in a workhouse must equally relieve him from the obligation to maintain her in an asylum. He is not liable under the poor law to pay for her maintenance in a workhouse if she has been guilty of adultery: *Rex v. Flintan* (1); *Culley v. Charman*. (2) For the same reason he is not liable if she wrongfully deserts him. In both cases she has disentitled herself to the position and rights of a wife. If she is justified in leaving and refusing to return her husband will be liable to maintain her even during her absence: *Thomas v. Alsop* (3); it is otherwise if she is not so justified: *Fordham v. Young* (4); *Johnston v. Sumner*. (5) Here it is admitted for the purposes of the case that Margaret Jones was not justified in leaving her husband.

(1) (1830) 1 B. & Ad. 227.

(2) (1881) 7 Q. B. D. 89.

(3) (1870) L. R. 5 Q. B. 151.

(4) (1888) 53 J. P. 133.

(5) (1858) 3 H. & N. 261.

Given for the respondents. A husband's common law liability to maintain his wife cannot be put an end to except by her adultery. The case of desertion stands upon a wholly different footing. All that such authorities as *Fordham v. Young* (1) decide is that if a husband offers to support his wife in his own house she cannot insist on being supported elsewhere, and the guardians, in the event of her becoming chargeable to the union, cannot be in a better position. The desertion by her of her husband does not put an end to his liability to maintain her, it only suspends it. However long she may remain away she can always go back, provided she has not been guilty of adultery, and claim that he shall maintain her. It is her wilfully remaining away from the home that temporarily suspends her right to maintenance. Lunacy deprives her of volition, and as the continuance of a lunatic's absence from home cannot be wilful, her husband's duty to maintain will revive on her becoming insane. In *Bradshaw v. Beard* (2), where a wife deserted her husband without excuse, and while still absent from him died, it was held that he was liable to pay for the expense of her burial. If she had elected to return to him just before her death he would clearly have been bound to pay for it. His liability was held not to be affected by the fact that her power of election was taken away by death. The result must be the same when the power of election is taken away by insanity. The husband must in such a case be just as much liable to support his wife's living body as to bury it when dead.

Langman in reply. It surely cannot be that if a wife who has deserted her husband becomes chargeable to the union he cannot be called upon to support her in the workhouse, but that if while there she becomes insane and is removed to an asylum he can be ordered to pay for her maintenance. The duty of a husband to bury the dead body of his wife who had deserted him seems to stand on a peculiar footing.

EARL OF READING C.J. This case raises an important question as to the obligation of a husband to maintain his

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(1) 53 J. P. 133. (2) (1862) 12 C. B. (N. S.) 344.

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wife after she has left him if, whilst still absent, she becomes a lunatic and chargeable to the union. The facts so far as material may be quite briefly stated. Margaret Jones more than twenty years ago left her husband of her own free will without just cause or excuse. In 1919 she became a lunatic, and the guardians of the union who were maintaining her in the asylum obtained an order from the justices that her husband was liable to pay them the sum of 15s. 9d. a week as being the cost of that maintenance. The question is whether as matter of law that order should stand. It is contended on behalf of the husband that as soon as the wife left the home of her own accord and without excuse his obligation to maintain her came to an end. It is said that his position was in this respect just the same as if she had been guilty of adultery, and it is well settled upon the authorities that where a wife has committed adultery which her husband has not condoned he ceases to be under any obligation to maintain her. Although there does not appear to be any authority directly in support of the view taken by the justices I am of opinion their view is correct. There is no doubt that at common law if a wife chooses wilfully and without justification to live away from her husband she cannot, so long as she continues absent, render him liable for necessities supplied to her, or for her maintenance by the union, for the reason that she has of her own free will deprived herself of the opportunity which the husband was affording her of being maintained in the home. But the relief of the husband from the obligation of maintenance continues only so long as she voluntarily remains absent. Her absence, although wrongful, does not affect the relationship of husband and wife. She is entitled after however long a period of absence to return at any time. There is in the present case no suggestion of the wife having misconducted herself in the sense of having committed adultery. She simply left her home and lived apart. Suppose she were to recover from her insanity and elect to return, it seems clear that the husband would be bound to maintain her. Nothing has happened to dissolve the relationship of husband and wife. Here the

wife has become a lunatic and continues to be insane. She is therefore unable to exercise any judgment. She cannot elect to return home, and while in that condition she becomes chargeable to the union. In those circumstances who ought to support her—the ratepayers or the husband? I think the answer is that so long as the relationship of husband and wife continues it is the husband. This appeal must be dismissed.

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SHEARMAN J. I am of the same opinion. The case presents some little difficulty and is bare of direct authority, but I think it must be decided upon the cardinal principle that by the common law of England a husband is bound to support his wife. Marriage is not a mere civil contract but confers a status upon the parties with corresponding obligations. When a wife becomes destitute, and the guardians undertake her support, one result of the obligation arising from the husband's status is that they may have recourse against him. To the general principle that the husband is bound to maintain his wife there is one exception, and that is where the wife is guilty of adultery, in which case the husband is discharged from all liability thereafter to maintain her or to recoup the guardians for her maintenance. That is definitely established by *Rex v. Flintan* (1) and *Culley v. Charman*. (2) But that is, so far as I am aware, the only case in which the husband's obligation is permanently determined. Where the wife voluntarily and without just excuse leaves her husband, so long as she of her own free will remains absent she cannot pledge his credit for necessaries, and the guardians cannot obtain a maintenance order against him in the event of her becoming chargeable. Her desertion of her husband does not, like her adultery, determine his obligation, it only suspends it during the time that she wilfully absents herself. Here, she might have returned to her husband and called upon him to maintain her at any time before she became insane. Upon her becoming insane her freedom of will came to an end, her absence from

(1) 1 B. & Ad. 227.

(2) 7 Q. B. D. 89.

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her home ceased to be wilful, with the consequence that her husband's obligation to maintain her revived. It seems to me that the justices decided this case rightly, and that the appeal must be dismissed.

SANKEY J. I agree. When a wife who has left her husband becomes lunatic it is wrong to say that she is refusing to live with her husband, and it is open to the justices to make an order under s. 5 of the Poor Law (Amendment) Act, 1850.

Appeal dismissed.

Solicitor for the appellant: *E. A. Howell, for Simons, Smythe & Daniel, Merthyr Tydfil.*

Solicitor for the respondents: *C. Everett, for Williams, Gittins & Taylor, Newtown.*

J. F. C.

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[1919. H. 2234.]

Foreign Judgment—Enforcement—Action—Defence—Judgment not final and conclusive—Judgment in Criminal Proceeding.

In order that a foreign judgment may be enforceable in an English Court, it must be a final and conclusive judgment of the Court by which it was pronounced, and it is not a final and conclusive judgment of that Court if an order has to be obtained in that Court for its enforcement, or if on application to that Court for an order to enforce it the original judgment is liable to be abrogated or varied; but it is not prevented from being a final judgment by reason of the fact that it may be the subject of an appeal to a higher Court.

The Small Offences Enactment No. 11 of 1898 of the State of Perak provides by s. 39 that if any person neglects or refuses to maintain his wife or child it shall be lawful for a magistrate to order him to make a monthly allowance for their maintenance; by s. 40 that if such person shall wilfully neglect to comply with any such order, the magistrate may, for every breach of the order, by warrant direct the amount due to be levied in the manner by law provided for levying fines, or may sentence him to imprisonment; and by s. 41 that on the application of any person

receiving or ordered to pay a monthly allowance under s. 40, and on proof of a change in the circumstances of such person, his wife, or child, the magistrate may make such alteration in the allowance ordered as he may think fit. Enactment No. 13 of 1905 provides that a Judicial Commissioner shall have power to hear and determine all appeals from the lower Courts.

By the judgment of a Judicial Commissioner of Perak dated December 13, 1916, which affirmed with a variation the previous order of a magistrate, under s. 39 of the above enactment of 1898, it was adjudged that the defendant should pay to the plaintiff, his wife, as from August 9, 1916, a certain sum per month for the maintenance of the plaintiff and the child of the marriage. In October, 1919, the parties having come to England, the plaintiff brought an action against the defendant claiming five monthly payments alleged to be due under the judgment of the Judicial Commissioner :—

Held, that the judgment was not final and conclusive within the doctrine of English law which enables judgments of foreign Courts to be enforced in England, and that the plaintiff could not recover.

Nouvion v. Freeman (1889) 15 App. Cas. 1, observations applied.

De Brimont v. Penniman (1873) 10 Blatchford's Circuit Court Rep. 436, held applicable.

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ACTION tried by Sankey J. without a jury.

The State of Perak is one of the Federated Malay States, a group of States governed by their native rulers, but by Treaty of 1895 under the protection and administration of the British Government.

In and after 1916 John Bardsley Harrop, the present defendant, and Mabel Leonie Harrop, his wife, the present plaintiff, were resident in the State of Perak.

In the autumn of 1916 the plaintiff, alleging that her husband was neglecting or refusing to maintain her and the child of the marriage, took proceedings against him in that State under an enactment thereof called the Small Offences Enactment, No. 11 of 1898 (1), which contains provisions dealing with the maintenance of wives and children.

The case came before the local magistrate at Sitiawan, who by an order dated October 19, 1916, directed that the defendant should pay to his wife for her maintenance \$250 per month as from June 1, 1916; that leave should be given to either party to apply for an increase or decrease of that sum; and that execution should be stayed pending appeal. The

(1) The material provisions of this enactment are set out in the judgment, post, p. 396.

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magistrate treated the case as coming under the criminal code of procedure, and sent a copy of the record to the Public Prosecutor.

The defendant appealed to the Judicial Commissioner for the State sitting at Ipoh. At the hearing of the appeal the Deputy Public Prosecutor appeared, but took no part in the proceedings. The judgment of the Judicial Commissioner, which was dated December 13, 1916, was, so far as material, as follows: "Criminal Appeal. No. 51 of 1916. Between J. B. Harrop, appellant, and Mabel L. Harrop and The Public Prosecutor, respondent. . . . This appeal against the order of the magistrate . . . coming on for hearing . . . in the presence of the counsel for the appellant and the respondent and the Deputy Public Prosecutor appearing in person . . . the Court doth find that the respondent was justified in her refusal to return to cohabit with the appellant on the ground that he had habitually treated her with cruelty and doth order and adjudge accordingly. And the Court doth further order that the appeal against the said order of the magistrate . . . be dismissed and that the said order be enforced as hereinafter varied. And the Court doth order and adjudge that the appellant do pay to the respondent as and from the 9th day of August, 1916, the sum of \$220 per month for the maintenance of the respondent and the child of their marriage . . . the amount due for the period from the 9th day of August, 1916, to this date after the rate of \$220 per calendar month to be paid forthwith and the sum of \$220 being maintenance for the month of December, 1916, to be paid on the 1st day of December, 1916, and thereafter the sum of \$220 be paid monthly by the appellant to the respondent on the first day of each and every month for maintenance for that month. And the Court doth lastly order that it be referred to the Registrar of this hon. Court to tax the respondent's costs of and incidental to this appeal as between party and party and when taxed such costs to be paid by the appellant to the respondent forthwith."

The defendant duly paid the instalments of maintenance under this order to the end of February, 1919, when he ceased to pay them.

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In May, 1919, the plaintiff, by her attorney, laid an information and complaint before the magistrate under s. 40 of the above-mentioned enactment, stating that the defendant had wilfully neglected to comply with the last-mentioned order inasmuch as he had not paid the maintenance due under that order for March, April and May, 1919, and praying that the defendant might be called upon to show cause why he should not be committed to prison until he had purged his contempt of Court and fulfilled the terms of the order. A summons dated June 4, 1919, issued to the defendant requiring him to appear before the magistrate to answer the charge. On June 23, 1919, the matter, which was entitled a "police case," was heard by the magistrate, who in the absence of the plaintiff refused to issue a warrant either of distress or of committal, and made an order dismissing the information. The plaintiff and the Deputy Public Prosecutor appealed to the Judicial Commissioner, in whose Court the appeal was entitled a criminal appeal between Mabel L. Harrop and the Public Prosecutor, appellants, and J. B. Harrop, respondent. On July 23, 1919, the Judicial Commissioner made an order reversing the order of the magistrate and ordering and adjudging that the present plaintiff should be at liberty to issue a warrant in the magistrate's Court to recover the said arrears of maintenance, and that it be levied by distress and sale of the defendant's property. The defendant complied with this last-mentioned order.

During 1919 both the plaintiff and the defendant came to England.

On October 16, 1919, the plaintiff brought the present action against the defendant in the King's Bench Division of the High Court of Justice by a specially indorsed writ claiming 134*l.* 1*s.* in respect of five months' payments for June to October, 1919, both inclusive, alleged to be due from the defendant to the plaintiff under the above-mentioned judgment of the Judicial Commissioner dated December 13, 1916.

The defendant in his defence stated (para. 2) that the said judgment was a penal judgment pronounced by a Criminal Court of the State of Perak in proceedings governed by the

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code of criminal procedure of that State ; that the said proceedings were criminal proceedings instituted against the defendant for an alleged offence against the criminal law of that State, namely, an offence under s. 39 of the Small Offences Enactment, No. 11 of 1898 (1) ; that that State was a party to the proceedings appearing therein by the Deputy Public Prosecutor of the State, and the sum ordered to be paid by the defendant under the said judgment was a penalty imposed for the said alleged offence against the criminal law of that State ; and that by reason of these facts the said judgment was unenforceable by Courts of Justice in England ; and (para. 3) that further, or in the alternative, the said judgment was unenforceable in the present proceedings by reason of the fact that it was not final and conclusive between the parties, but was liable to be abrogated or varied by the same Court which issued it.

The depositions of Mr. W. H. Thorne taken on commission were read. In his examination-in-chief by the plaintiff's counsel he stated (inter alia) that he was a solicitor in England, an advocate and solicitor of the Straits Settlements since 1907, and a member of the Bar of the Federated Malay States since 1912 ; in the plaintiff's proceedings against her husband in Perak, his (deponent's) firm acted for her, deponent himself being her advocate ; the proceedings were under the Small Offences Enactment No. 11 of 1898, s. 39, for maintenance ; the proceedings began before the magistrate, who had a limited civil and criminal jurisdiction ; the plaintiff and defendant were the only parties before the magistrate ; the public prosecutor was not a party, he having no power to institute proceedings under the section, though he had a general power of direction ; he was not present before the magistrate ; the maintenance was for the wife or child, and the State did not participate ; the magistrate made an order in favour of the plaintiff ; the defendant appealed to the Judicial Commissioner, who had unlimited jurisdiction both civil and criminal ; both parties were represented before the Judicial Commissioner ;

(1) The material provisions of this enactment are set out in the judgment, post, p. 396.

the Public Prosecutor appeared, explained that the record from the magistrates' Court had been sent to him but that he did not know why, as he was not a party, stated that he did not propose to take part, and asked permission to withdraw, and the judge concurred ; the appeal was heard in the absence of the Public Prosecutor ; the magistrates were civil servants with no legal training, who were provided with the codes of civil and criminal procedure ; deponent supposed that some one in the magistrate's office treated the matter in question as a criminal matter, and that it went through the books under the Criminal Code ; when an appeal was entered in the Court of the Judicial Commissioner, the magistrate caused copies of the record to be made, two of which were sent to the Court of the Judicial Commissioner and one to the Deputy Public Prosecutor ; in purely criminal matters the latter either himself conducted the case for the Crown, or appointed some member of the Bar to do so ; in this case he did not appear himself or give any fiat ; the appeal failed save that the order of the magistrate was varied ; at the end of the order of the Judicial Commissioner there was a clause as to costs ; there was no power to award costs under the Criminal Code, but in case of a frivolous complaint the defendant might be awarded some compensation ; in deponent's opinion the proceedings before the Judicial Commissioner were civil entirely ; before the magistrate they were civil in the result, but quasi-criminal in form ; they should have been purely civil, and it was wrong to send them to the Public Prosecutor ; the further judgment of the Judicial Commissioner dated July 23, 1919, was for three months' arrears of maintenance ; under s. 41 of the Enactment of 1898 the Court had jurisdiction to make alterations in the allowance, but deponent's view was that the Court had no jurisdiction to make an order which affected arrears ; the order now sued upon was a final order and *res judicata* between the parties.

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In cross-examination by defendant's counsel deponent stated that with certain reservations as to amount there was an appeal to the Privy Council from every civil decision of the Federated Malay States ; the plaintiff was correct in taking

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proceedings before the magistrate under Enactment No. 11 of 1898, but a lawyer in the position of the magistrate would not have adopted the Criminal Code in such a case as this; the application of the criminal procedure began when the proceedings were instituted before the magistrate, but deponent thought it ended when the matter was sent to the Judicial Commissioner; the appeal was wrongly described as a "criminal appeal," but that did not much matter because the Judicial Commissioner did not treat it as a criminal appeal as appeared from his having ordered costs; the Criminal Code, s. 304 (ii.), no doubt provided that a criminal prosecution before the Judicial Commissioner should be conducted by the Public Prosecutor or a police inspector; there was apparently no reason for the appearance of the Public Prosecutor in any civil proceeding; it was no doubt open to the defendant under the proviso to s. 40, sub-s. 1, of the Enactment of 1898 to resist the enforcement of the Judicial Commissioner's judgment by offering to take his wife back; or it was open to him under s. 41 to apply on proof of a change in circumstances for an alteration in the allowance; under s. 40, sub-s. 1, the only mode of execution appropriate to this case would be a warrant to levy the amount due on the defendant's property.

Disturnal K.C. (A. M. Latter with him) for the plaintiff. The plaintiff is entitled to recover in this Court the arrears due from the defendant to her under the judgment of the Judicial Commissioner of the State of Perak. Although that State is under British protection, the plaintiff does not deny that the judgment of a Court of that State must be regarded as a foreign judgment for the purpose of its enforcement in an English Court.

A foreign judgment is enforceable in an English Court except on certain grounds. The only grounds on which it is suggested that the judgment sued upon is not enforceable in this Court are, that it is not final and conclusive, and that it is a judgment in a criminal proceeding.

First, the judgment in question is not unenforceable in this

Court on the ground that it is not a final and conclusive judgment. According to the law of Perak as set forth in its Civil and Criminal Codes and other enactments a judgment of the Judicial Commissioner, in a case such as this, absolutely and irrevocably establishes the right pronounced by it so as to make it *res judicata* between the parties, subject only to the possibility of its reversal on appeal to a higher Court. The defence in so far as it is founded on the non-finality of the judgment must therefore fail: *Nouvion v. Freeman* (1) per Lord Herschell (2), and Lord Watson (3); *Phillips v. Batho* (4); and *Harris v. Taylor*. (5)

Secondly, the judgment is not unenforceable in this Court on the ground that it is a judgment in a criminal proceeding. Neither by the Criminal Code, 1902, nor by the Civil Code, nor by any other enactment is a proceeding to recover maintenance treated as a criminal proceeding. The facts that in the proceeding costs may be awarded and that an appeal is provided for show that it is a proceeding of a civil nature. Enactment No. 13 of 1905 provides by s. 45 that the Court of the Judicial Commissioner shall have original and appellate jurisdiction in civil and criminal matters, and by s. 50 that that Court in its appellate jurisdiction shall have power to hear appeals from lower Courts in both civil and criminal matters. The fact that the plaintiff's proceeding for maintenance came by way of appeal before the Judicial Commissioner does not therefore imply that that proceeding or the judgment of the Judicial Commissioner thereon was of a criminal rather than a civil nature. The plaintiff's proceeding for maintenance under Enactment No. 11 of 1898 (6) having been taken for the purpose of enforcing her own private right and not any right of the State in which it was taken, was merely remedial and was not penal or criminal, and consequently this judgment was not a judgment in a criminal proceeding within the rule of international law which prohibits

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(1) 15 App. Cas. 1.

(2) Ibid. 9.

(3) Ibid. 13.

(4) [1913] 3 K. B. 25.

(5) [1915] 2 K. B. 580.

(6) The material provisions of this enactment are set out in the judgment, post, p. 396.

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the Courts of one country from enforcing the criminal laws of another: *Huntington v. Attrill*. (1)

Harold Murphy for the defendant. The foreign judgment sued upon is not enforceable in this Court.

First, that judgment is not a final and conclusive judgment of the Court by which it was pronounced. In certain events another order is required for its enforcement. If the defendant refuses to comply with it an application has to be made under the Small Offences Enactment No. 11 of 1898 (2), s. 40, to a magistrate to direct the issue of a warrant for levying the amount due upon the defendant's property, or to sentence the defendant to imprisonment. Moreover, the judgment is liable to be varied. By s. 41 of that enactment, on proof of a change in the circumstances, the magistrate may make such alteration in the allowance for maintenance as he may think fit. The Judicial Commissioner must be taken to have the same power, and moreover by Enactment No. 13 of 1905, s. 50, he has full powers of supervision and revision in respect of all proceedings in the lower Courts. It is easy to give examples of a change in the circumstances of the parties on proof of which the magistrate or Judicial Commissioner would make an alteration in the allowance ordered. The person ordered to pay the maintenance may cease to be able to do so. The person in whose favour the judgment or order for maintenance was made might subsequently acquire independent means. That person might commit some act disentitling him or her to a continuance of the maintenance. Or the husband might obtain in this country a decree dissolving the marriage and giving him the custody of the children. As the judgment in question remains subject to the control of the Court which pronounced it and may be altered by that Court at any time in accordance with a change in the circumstances of the parties, it is not a final judgment: *In re Henderson*. (3) This Court, which in this action cannot itself inquire into the circumstances of the parties, could not safely treat the judgment in question as final and binding unless the parties first applied to the Court of Perak to modify the judgment in

(1) [1893] A. C. 150.

(2) See note (6), p. 396.

(3) (1888) 20 Q. B. D. 509.

accordance with any alteration that may have taken place in the circumstances since the judgment was given: see per Woodruff J. in *De Brimont v. Penniman*. (1) If this Court were now to give a decision in favour of the plaintiff it might impose a great hardship upon the defendant by compelling him to pay maintenance with which he ought not justly to be charged. That a suit to enforce a foreign judgment for the payment of maintenance by instalments cannot be maintained on the ground that the judgment is not final, has already been expressly decided in *De Brimont v. Penniman*. (2)

Secondly, the judgment was a judgment in a criminal proceeding. Relief similar to that which is given by this judgment might no doubt be obtained in this country in proceedings which are not of a criminal character, but it does not follow that the proceeding in *Perak* in which the judgment was pronounced was not criminal in character. The law of that State, presumably for some good reason, treats failure to maintain a wife or child as a penal offence, and provides a procedure for the recovery of the maintenance which possesses the essential features of a criminal cause. Enactment No. 11 of 1898, which provides for the matter, is entitled an enactment relating to small "offences." The proceeding for maintenance was described in the Court of the magistrate as a "police case," and in the Court of the Judicial Commissioner as a "criminal appeal." By s. 40 of the last-mentioned enactment a person wilfully neglecting to comply with an order for maintenance may be sentenced to imprisonment. There is no provision in the Codes nor in any other enactment relating to the proceeding for maintenance which prevents it from being of a criminal character. Neither the fact that costs may be awarded against the defendant nor the fact that the order made is subject to appeal is necessarily inconsistent with the proceeding being of that character. The case of *Huntington v. Attrill* (3) is distinguishable, for there the proceeding in which the foreign judgment was pronounced was essentially a proceeding for the enforcement of a civil liability, whereas here it

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(1) 10 Blatchford's Circuit Court
Rep. 436, 443.

(2) Ibid. 436.

(3) [1893] A. C. 150.

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was a claim under a penal enactment which is cognizable in a criminal Court.

If the plaintiff is justly entitled to the maintenance which she claims she can recover it in independent proceedings taken in this country.

Disturnal K.C. in reply. The judgment for maintenance is final. By s. 42 of the Enactment of 1898 payment of maintenance due under a judgment or order for maintenance may no doubt be enforced by a magistrate in any district in which the person liable may be found. The original judgment for maintenance, however, remains a final judgment, and in the proceeding under that section is treated as such. In the present case the judgment has already allowed the judgment to be enforced against him under that section. The judgment may no doubt be varied in accordance with a change in circumstances, but here a change in circumstances has not been proved, and it cannot be presumed. The case of *De Brimont v. Penniman* (1) is distinguishable, for there the plaintiff was only seeking to enforce a liability imposed by the law of France upon a father-in-law to support his son-in-law, whereas here the plaintiff seeks to enforce the natural obligation of the defendant to support his wife and offspring.

A proceeding for the recovery of maintenance has none of the elements of a criminal proceeding.

Cur. adv. vult.

SANKEY J., May 12, 1920, read the following judgment :—
In this case the plaintiff, who is the wife of the defendant, sues her husband upon a judgment obtained in the Court of the Judicial Commissioner of Perak. Perak is under British protection, but it is agreed that a decision of its Courts is a foreign judgment. The defence to the action is that the judgment in question was (1.) obtained in a criminal proceeding, and (2.) not final and conclusive, and that therefore an action thereon is not maintainable in our Courts.

The facts are as follows. The plaintiff alleged that her

(1) 10 Blatchford's Circuit Court Rep. 436.

husband neglected or refused to maintain her and the child of the marriage, and she brought proceedings against him under the Small Offences Enactment No. 11 of 1898, s. 39, which deals with the maintenance of wives and children. The magistrate of the Court awarded the plaintiff \$250 a month, which sum on appeal to the Court of the Judicial Commissioner was reduced by an order dated December 13, 1916, to \$220. Payments were duly made up to the end of February, 1919, when they fell into arrear, and the plaintiff applied under s. 40 of the above-mentioned enactment to enforce the order for payment of \$220 a month. The magistrate refused the application, but upon July 23 the Judicial Commissioner allowed the wife's appeal and made an order for payment of the arrears due March, April and May, which was complied with.

Subsequently both the plaintiff and the defendant came over to England, and the plaintiff now sues for the \$220 alleged to be due for each of the months June to October, 1919, under the order of December 13. The defendant has wilfully neglected to comply with the original order to pay \$220 every month, but no warrant has been issued by the Perak magistrate under s. 40 of the enactment.

The defence, as above stated, is that the order (1.) was a judgment in a criminal proceeding, (2.) was not final and conclusive. No evidence was called before me, but the deposition of an advocate practising in the Courts of Perak, whose testimony was taken on commission, was read. It will be convenient to deal with the second of the two points first.

Was the order of December 13 final and conclusive? It is first necessary to read the material sections of the Enactment, ss. 39, 40 and 41, which are as follows. They come under a number of sections entitled: "Maintenance of wives and Children." Sect. 39 provides: "(1.) If any person neglects or refuses to maintain his wife or legitimate child unable to maintain itself, it shall be lawful for a magistrate, upon due proof thereof, to order such person to make a monthly allowance for the maintenance of his wife or such wife or such child

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as aforesaid, in proportion to the means of such person, as to the magistrate shall seem reasonable." Sect. 40 provides : "(1.) If such person shall wilfully neglect to comply with any such order, the magistrate may, for every breach of the order, by warrant, direct the amount due to be levied in the manner by law provided for levying fines imposed by magistrates, or may sentence him to imprisonment of either description for a term not exceeding one month for each month's allowance remaining unpaid. Provided that if any person against whom an order has been made for the maintenance of his wife offers to maintain his wife on condition of her living with him, and his wife shall refuse to live with him, it shall be lawful to consider any grounds of refusal stated by such wife, and the magistrate may make the order aforesaid, notwithstanding such offer, if he be satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty." Sect. 41 provides : " On the application of any person receiving, or ordered to pay, a monthly allowance under the provisions of s. 40, and on proof of a change in the circumstances of such person, his wife, or child, the magistrate may make such alteration in the allowance ordered as he may think fit."

Now it will be observed that the order in question is liable to be abrogated or varied upon an application being made under s. 41 for an order to enforce it, on proof of a change in the circumstances of the plaintiff or the defendant or their child, and if the defendant wilfully neglects to comply with the order the magistrate may direct the amount to be levied on him in the manner by law provided for levying fines, or may sentence him to imprisonment.

The law as to whether a judgment is final and conclusive was considered in the case of *Nouvion v. Freeman*. (1) In that case a Spanish "remate" judgment was held not to be final and conclusive. Lord Herschell says (2) : " My Lords, I think that in order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is

(1) 15 App. Cas. 1.

(2) Ibid. 9.

sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties. If it is not conclusive in the same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that Court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our Courts for the payment of that debt." Lord Watson says (1) : " The English cases to which I have already referred establish a more liberal rule in regard to the enforcement of foreign judgments than is to be found in the older authorities ; but no decision has been cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it. All the authorities cited appear to me, when fairly read, to assume that the decree which was given effect to had been pronounced *causa cognita*, and that it was unnecessary to inquire into the merits of the controversy between the litigants, either because these had already been investigated and decided by the foreign tribunal, or because the defendant had due opportunity of submitting for decision all the pleas which he desired to state in defence. In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court ; but it must be final and unalterable in the Court which pronounced it ; and if appealable the English Court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal." In my view a judgment or order cannot be said to be final and conclusive if (1.) an order has to be obtained for its enforcement, and (2.) on application for such an order the original judgment is liable to be abrogated or varied : see *Merrifield v. Liverpool Cotton Association*. (2)

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(2) (1911) 105 L. T. 97.

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I was further referred to the American case of *De Brimont v. Penniman* (1), and although it is on a somewhat different matter it seems to me to set out reasons not inappropriate to the decision on the present case. The headnote is as follows : "G., a French citizen, married, in France, the daughter of P., and of his wife C., citizens of the United States. Such wife of G. died, leaving a child of such marriage. Under the statute law of France, providing, that a father-in-law and a mother-in-law must make an allowance to a son-in-law who is in need, so long as a child of the marriage is living, G. afterwards obtained, in a Court of France, a judgment or decree against P. and C., then residing in France, in an action in which they were served with process and appeared, requiring P. and C."—that is the father-in-law and the mother-in-law—"to pay him"—that is the son-in-law—"a certain sum per year, in monthly payments, in advance, one-third of it to be for his use, and two-thirds of it for the use of the child. G."—that is the Frenchman—"brought the action of debt, on the judgment or decree, in this Court,"—that is the American Court—"against P. and C., to recover the amount of the decreed payment for two years and seven months." So that was an action by a French son-in-law against an American father-in-law and mother-in-law in the American Court for judgment obtained in a French Court under French law. "Held, that the suit could not be maintained." In the course of his judgment, Woodruff J. said (2) : "Beyond these considerations, I think it plain, upon the face of the declaration, and especially where the other admitted provisions of the French Code (stated by the counsel) are brought into view, that the decree itself should be deemed, and would, in France itself, be deemed, local and provisional, and designed to be carried into effect there, and only upon persons and property found there. Their laws contemplate the supervisory control and direction of their Courts over the parties, in all the changes which may occur in their relative pecuniary conditions." Stopping there for the moment, that is exactly the same as the law of Perak in the Code to which I have just referred. "The

(1) 10 Blatchford's Circuit Court Rep. 436.

(2) Ibid. p. 442.

decree in question prescribes a temporary rule of allowance and provision for support, subject to modification according to circumstances. There is no award of any sum certain, to be presently paid, and the declaration does not show that any sum whatever could even there be collected, without a further application to the Court, for some process or other award of means by which some definite amount shall be collected. Continuing necessity, on the one hand, and continuing ability, on the other, are assumed for the future, and the absence of either makes even the decreed allowance to cease. . . . In harmony with what has been already suggested, I add, that we cannot hold that such decree is final, operative and binding unless and until the defendants go to France and there appeal to the discretion of their Courts to modify the decree according to the new circumstances which may arise."

I was informed that the day before the hearing in the present case the defendant had presented a petition for divorce against his wife. As to which of the parties is right I have no idea, but assuming that the husband is and that he gets his divorce it would be a strange result that he could be sued by his divorced wife in this country for arrears of maintenance under the original order made in Perak, arrears which the Court in Perak might never have adjudged to be paid, when she applied for an order to enforce them. Moreover, to give effect to the order in this country would enable the plaintiff to obtain in this country a greater benefit from it than she could obtain from it in Perak, for here the defendant is not entitled to take the point that there is a change of circumstances which is open to him at Perak under s. 41 above referred to. "It would be entirely contrary to the principle on which English Courts proceed in enforcing a foreign judgment, if we were to adopt that course": see the judgment of Cotton L.J. in the report of *In re Henderson, Nouvion v. Freeman* (1) in the Court of Appeal. The original order laid on the defendant no present duty to pay the sum now claimed: see Westlake's Private International Law, 5th ed., p. 398.

I am of opinion, therefore, that this judgment of the Court

(1) (1887) 37 Ch. D. 244, 249, affirmed 15 App. Cas. 1.

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of Perak is not final and conclusive within the doctrine of English law which enables judgments of foreign Courts to be enforced in England.

It is not necessary for me to give an opinion upon the other point. If and so far as it is a question of fact, the facts are all contained in the depositions above referred to, and it is not necessary to find them to assist the Court of Appeal to come to a conclusion on the first point, that is to say, whether the matter is a judgment obtained in a criminal proceeding, should they hold me to be wrong on the second. My judgment is for the defendant.

Judgment for defendant.

Solicitors for plaintiff: *Nisbet, Drew & Loughborough.*

Solicitors for defendant: *Stephenson, Harwood, Witt & Mackintosh.*

J. R.

1920
 July 14.

BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LIMITED v. MACLAY.

[1920. B. 950.]

*Practice—Action claiming a Declaration—Public Officer sued as an Individual
 —Claim for Compensation out of public Funds.*

By a direction under reg. 39 BBB of the Defence of the Realm Regulations lawfully given by the defendant, who at all material times was His Majesty's Shipping Controller, a vessel belonging to the plaintiffs was diverted from her voyage. The direction was subsequently cancelled, but the plaintiffs lost the use of their vessel for some days and incurred certain expenses in consequence of the direction. The plaintiffs thereupon sued the defendant claiming a declaration that they were entitled to compensation for the loss and expenses so incurred by them, and that the amount of compensation should be referred for assessment to the Admiralty Transport Arbitration Board or to such other referee or tribunal as the Court might direct. No statute or regulation imposed upon the defendant any financial responsibility in the matter:—

Held, that the plaintiffs, by suing the defendant in the only way

open to them—namely, as an individual—could not obtain a declaration of their rights to compensation against the Treasury, and therefore that the action must be dismissed as misconceived.

ACTION tried by Rowlatt J. in the Commercial list.

The plaintiffs, the owners of the steamship *Hornayun*, sued the defendant, who was at all material times His Majesty's Shipping Controller, claiming a declaration that they were entitled to compensation for the loss and expenses incurred by them by reason of a certain direction given by the defendant under reg. 39 BBB of the Defence of the Realm Regulations, and that the amount of compensation should be referred for assessment either to the Admiralty Transport Arbitration Board or to such other referee or tribunal as the Court might direct.

While on a voyage from Newport to Alexandria with a cargo of coal the *Hornayun* was, on September 30, 1919, directed by the defendant, by wireless message of that date, to proceed with her cargo to Port Said. She accordingly proceeded to Port Said, arriving there on October 3. On October 7 the master was informed by the senior naval officer at Port Said that the above-mentioned direction by the defendant was cancelled and that the vessel might proceed on her voyage to Alexandria. She accordingly proceeded to Alexandria, arriving there on October 8, six days later than she would have done had she not been directed by the defendant to proceed to Port Said. In respect of the loss of the use of the vessel and expenses incurred by reason of her diversion to, and remaining at, Port Said the plaintiffs brought this action.

By his defence the defendant pleaded that the facts alleged by the plaintiffs did not disclose any contract by any person on behalf of the Crown or otherwise or any other ground for the declaration or relief claimed. Para. 4 was as follows : "The defendant will object at the trial that he is not rightly made a party to this action and that the statement of claim discloses no cause of action against the defendant either in his personal capacity or as Shipping Controller in respect of any of the relief claimed."

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It was stated on behalf of the plaintiffs that they accepted the position that the defendant was authorized by law to give the direction he did diverting the plaintiffs' vessel to Port Said.

The argument is confined to the question whether the action was maintainable against the defendant, the Court finding it unnecessary to deal with the plaintiffs' claim on the merits.

MacKinnon K.C. and *Jowitt* for the plaintiffs. An action for a declaration will lie against the Shipping Controller : *China Mutual Steam Navigation Co. v. MacLay*. (1)

Sir Ernest Pollock S.-G. and *G. W. Ricketts* (*Sir Gordon Hewart A.-G.* with them) for the defendant. This action is not maintainable. *China Mutual Steam Navigation Co. v. MacLay* (1) does not support the plaintiffs' view. There the Shipping Controller purported to do something which he had no lawful authority to do, and *Bailhache J.*, applying certain observations in *Raleigh v. Goschen* (2), held in effect that the defendant, the Shipping Controller, was in the particular matter a trespasser, and consequently that the declaration there claimed could properly be made. The position in this case is entirely different. Admittedly the direction for the diversion of the plaintiffs' vessel was lawfully given under a valid regulation; there was therefore no tort by the defendant. Further, a declaratory judgment will not be given unless there is some one before the Court against whom the declaration can be made effective. In this case the result of making the declaration claimed would be not that the defendant should do, or abstain from doing, something, but that a claim for compensation should be entertained and paid by the Treasury. There are certain wide observations in *Guaranty Trust Co. of New York v. Hannay* (3) with regard to the power of the Court to give declaratory judgments, but these must be read subject to this, that the particular defendant is a person against whom the

(1) [1918] 1 K. B. 33.

(2) [1898] 1 Ch. 73.

(3) [1915] 2 K. B. 356.

plaintiff is entitled to claim some relief. *Dyson v. Attorney-General* (1) decided that the Attorney-General can be sued to obtain a declaration of public rights. That, however, is no authority in this case, where it is sought to obtain against the defendant as an individual a declaration that the public purse is liable.

[They also referred to *London Association of Shipowners and Brokers v. London and India Docks Joint Committee* (2) and *Hosier Bros. v. Earl Derby*. (3)]

MacKinnon K.C. in reply. An action against the defendant is the only remedy open to the plaintiffs to obtain a declaration that they are entitled to compensation. It is sought to distinguish *China Mutual Steam Navigation Co. v. MacLay* (4) on the ground that there the defendant claimed to do something, whereas here, it is said, he does not claim to do anything. That is not so. Here the defendant refuses to agree to compensation. It, however, the action is wrongly brought against the defendant, I ask leave to amend by substituting the Attorney-General as defendant.

ROWLATT J. In this case the plaintiffs bring their action against Sir Joseph MacLay, who is the official known as the Shipping Controller, for a declaration that they are entitled to compensation in respect of the loss of time and consumption of stores by their vessel which, while on a voyage with a cargo of coals to Alexandria, was ordered by the defendant to go to Port Said.

It is not disputed that the defendant was authorized by law to give this direction. Further, it is not suggested that any statute or regulation puts upon Sir Joseph MacLay any financial responsibility in respect of the matters in question. If there is a liability to pay compensation under para. 3 of reg. 39 BBB it is a liability which rests upon the Government, that is, the Treasury of this country.

In these circumstances the point is taken that this matter

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(1) [1911] 1 K. B. 410; [1912]
1 Ch. 158.

(2) [1892] 3 Ch. 242.

(3) [1918] 2 K. B. 671.
(4) [1918] 1 K. B. 33.

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cannot be brought up for decision in an action for a declaration against Sir Joseph MacLay. No action can be brought against the Shipping Controller as such, as an action can be brought against the Secretary of State for India in Council. The action must be brought against Sir Joseph MacLay, if at all, as an individual. It has long been established that if an official of the State does something which if done by any one else would be a tort, and there is no law authorizing him, in virtue of his office, to do that particular thing, he must, notwithstanding his official position, answer for it in his own name. An action for an injunction or for a declaration that he must not do the thing again will lie against him. Similarly, if a person by virtue of the position which he holds claims to be entitled to do a particular thing himself, an action is maintainable at the instance of some one affected to have it declared that the defendant is not entitled to do that thing. But in dealing with matters of contract or a question of money liability under a statute the position is very different. In the case of a contract made by the representative of a public department, that person is an agent only, and there can be no question of suing him for money under the contract. It is not sought in this case to sue Sir Joseph MacLay for money payable by statute, but the question is whether when a person has a demand of this kind he can get a declaration of his rights against the Treasury by suing an official in his own name because he cannot sue him in any other way.

This subject first came into great prominence in *Dyson v. Attorney-General*. (1) There certain forms had been issued by the Inland Revenue authorities. The Attorney-General was in a position to enforce obedience to them by bringing informations for penalties. It was there decided that an action could be brought against the Attorney-General in the name of his office to have it declared that the forms were bad, and that the Attorney-General was not entitled to enforce obedience to them. That is how it was put by Pickford L.J. in *Guaranty Trust Co. of New York v. Hannay* (2), and that adequately

(1) [1911] 1 K. B. 410 ; [1912] 1 Ch. 158.

(2) [1915] 2 K. B. 536, 562.

describes the case. The decision in *Dyson v. Attorney-General* (1) was based upon the old practice in Chancery. It had long been recognized that the Crown cannot be sued, nor could the Attorney-General be sued as representing the Crown, there being nothing in his patent making him liable to be sued for the Crown. But for a long time, as is explained in *Mitford on Pleadings*, it had been quite common to make the Attorney-General a defendant to actions in Chancery. In administering property the Court of Chancery decided the rights of competing claimants, and it often happened that it dealt with a subject-matter in which the Crown, as well as the immediate defendant, had an interest, and when that happened the Attorney-General was made a defendant to the bill so that he could appear and establish or relinquish the rights of the Crown. In the same way a foreign Sovereign, who could never be sued, was sometimes added as a defendant to a bill in Chancery when the subject-matter was one in which there might be a claim on his behalf. If the foreign Sovereign was made a defendant he could come in if he chose. In the cases where the Attorney-General was made a party it will be found that there could be no personal process against him. He is not a corporation. The bill was simply brought to his attention by being left at his chambers and he could come in and argue if he liked. He was the officer of the Crown to assert the Crown's rights, and I can quite understand that in *Dyson v. Attorney-General* (1)—a case in which I was one of the counsel—the feeling of the judges was that the Attorney-General, the officer to whom is intrusted the enforcement of the Crown's rights in Court, should be made a defendant so that it might be ascertained what rights he had on behalf of the Crown to enforce. In that way the practice grew up. But what is the position of Sir Joseph MacLay? As I have said, he cannot be sued as Shipping Controller. He is sued merely as an individual for a declaration, and I cannot conceive how the Crown can be in any way bound by it. The defendant may possibly fight the case at his own

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expense—he does not do so in this case, I gather. He is dominus of the litigation and can do what he likes with it. He may go out of office, or he may die, in which latter case his executors might take up the case. A case of this kind is completely out of the region of those actions which are brought against the Attorney-General where, there being an issue raised in the Court, notice is given to the barrister who holds the patent of the King to appear for him in his Courts, to come in and argue the case. I am at a loss to know how that procedure can be extended to an individual who holds a different kind of office, who has done nothing for which a complaint can be made against him, and who is not threatening to commit any tort, or putting forward any claim. In my opinion this action is misconceived.

The plaintiffs then say that this is a trifling matter which can be cured by adding the Attorney-General. I do not think the defect can be remedied in that way. The machinery of *Dyson v. Attorney-General* (1) cannot be used to prejudge the issue of what may have to be adjudicated upon in a petition of right as to a money claim against the Treasury. There is a difference in substance and constitutionally between a petition of right and an action against the Attorney-General. A petition of right making a money demand against the Treasury is dealt with by the Sovereign under the advice of the Secretary of State. I have known petitions of right disallowed. But if an action is brought against the Attorney-General he has practically no choice but to appear, and in that manner the procedure marked out for a petition of right would be got rid of. I cannot treat things which appear to me essentially and constitutionally different as the same and substitute the name of another public officer for the one named in the writ. The action being, as I have said, misconceived must be dismissed.

I say nothing as to the merits. Any opinion I might express would be obiter, and in these days when it is said that there is a disregard of the limits of their powers

(1) [1911] 1 K. B. 410; [1912] 1 Ch. 158.

by persons holding official positions it lies upon the Courts by way of example not to exceed the proper ambit of their jurisdiction.

Judgment for defendant.

Solicitors for plaintiffs : *Holman, Fenwick & Willan.*

Solicitor for defendant : *Treasury Solicitor.*

J. S. H.

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[IN THE COURT OF APPEAL.]

DI FERDINANDO *v.* SIMON, SMITS & COMPANY,
LIMITED.

C. A.

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July 12.

[1919. D. 1109.]

Contract—Breach—Damages incurred Abroad—Assessment—Rate of Exchange applicable.

The defendants contracted to carry goods for the plaintiff from this country to Italy and deliver them there on February 10, 1919, but in breach of their contract failed to do so, and converted the goods. In an action by the plaintiff the Court fixed the damages as the value of the goods in Italy on February 10—namely, 190 lire per 100 lb. :—

Held, that in arriving at the proper equivalent in British currency for the purposes of assessing these damages, the rate of exchange prevailing between the two countries on February 10, 1919, when the breach was committed, and not that prevailing at the date of the judgment, should be adopted.

Decision of Roche J. [1920] 2 K. B. 704 affirmed.

APPEAL from the judgment of Roche J. at the trial of the action. (1)

The facts are shortly as follows : The plaintiff, an Italian merchant, carrying on business in Milan, Italy, purchased about twenty-five tons of sodium sulphide in this country, and the defendants, a firm of shipping agents and shippers in England, contracted to carry these goods for the plaintiff and to deliver them in Milan on February 10, 1919. In

(1) [1920] 2 K. B. 704.

C. A. an action by the plaintiff claiming damages, Roche J. found
 1920 that in breach of this agreement the defendants had not
 carried the goods, but had converted them, and he fixed
 DI the value of the goods as their value in Italy on February 10,
 FERDINANDO the value of the goods as their value in Italy on February 10,
 v. 1919—namely, 190 lire per 100 lb. In view of the fluctua-
 SIMON, tions in the exchange between Great Britain and Italy,
 SMITS & Co. a question arose at the trial as to what rate of exchange was
 to be adopted in assessing the damages in the currency
 of this country, that which prevailed on February 10, 1919,
 the date of the breach, which was agreed at 31 lire to the
 pound, or that prevailing at the date of the judgment, agreed
 at 62 lire to the pound.

Roche J. held that the date of the breach, February 10,
 was the date on which the rate of exchange should be cal-
 culated, and he gave judgment for the plaintiff for a sum
 calculated on that basis. The actual figures are set out
 in the judgment of Bankes L.J.

The defendants appealed.

Neilson K.C. and *Langton* for the defendants. The proper
 date on which to take the rate of exchange is the date of
 the judgment. At the date of the breach, February 10,
 1919, the plaintiff was entitled to be paid a certain number
 of lire as damages for the breach of contract. He is accord-
 ingly entitled to have judgment for such a sum in sterling
 as will at the date of the judgment produce that number
 of lire. The sum in sterling must be ascertained then, and
 not at the date of the breach. This was the view taken by
 Roche J. in *Kirsch v. Allen & Co.* (1) (a decision not affected by
 the reversal of the judgment in the Court of Appeal (2)),
 and by the Court of Appeals of Maryland in *Marburg v.*
Marburg. (3) This seems to be the view taken in Story's
 Conflict of Laws, 8th ed., ss. 308–311a, and in Kent's Com-
 mentaries, 12th ed., vol. iii., p. 117, note c. In *Cash v.*
Kennion (4) Lord Eldon said: "I cannot bring myself to

(1) [1919] W. N. 301; 25 Com. Cas. 174.
 Cas. 63, 68.

(3) (1866) 26 Maryland 8.

(2) [1920] W. N. 73; 25 Com.

(4) (1804) 11 Ves. 314, 316.

doubt, that, where a man agrees to pay 100*l.* in London upon the 1st of January, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had, if the contract had been performed." That is the principle applicable to this case. See also *Scott v. Bevan*. (1) That principle was cited with approval by Lindley M.R. in *Manners v. Pearson*. (2) The decisions of Bailhache J. in *Barry v. Van den Hurk* (3) and of McCardie J. in *Lebeaupin v. Crispin* (4), agreeing with the decision of Roche J. in the present case, ought to be overruled.

Schiller K.C. and *Micklethwait* for the plaintiff were not called upon.

BANKES L.J. This appeal raises a question of considerable importance owing to the variation which has occurred in the rates of exchange since the war.

The plaintiff brought an action in England against the defendants for breach of contract to carry certain goods for him and to deliver them in Milan. The plaintiff is a merchant carrying on business in Milan, and the defendants are carriers carrying on business in England. The learned judge has held that the defendants committed a breach of contract in not delivering the goods to the plaintiff, and were guilty of conversion. The date of breach was February 10, 1919, and he assessed the damages as on that date by ascertaining the value of the goods to the plaintiff in Milan at that time. He assessed their value in Italian money at, taking a round sum, 48,000 lire. At that date the rate of exchange was such that the equivalent of that number of lire in English money was 1555*l.* The action was tried on March 30, 1920, and the rate of exchange had so altered that on that date the equivalent in English money was only 780*l.* The defendants contended that the plaintiff was only entitled to judgment for 780*l.* representing the 48,000 lire at the rate of exchange prevailing at the date of the

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(1) (1831) 2 B. & Ad. 78.

(2) [1898] 1 Ch. 581, 588.

(3) [1920] 2 K. B. 709.

(4) *Ibid.* 714.

C. A. judgment. The plaintiff contended that he was entitled
 1920 to 1555*l.* representing 48,000 lire at the date of the breach.
 ———— DI Roche J. decided that the right date was the date of breach,
 FERDINANDO and he gave judgment for 1555*l.*
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It seems to me that the difficulty to a large extent disappears if one concentrates one's attention on the rule of law which has to be applied. The plaintiff is entitled to have his damages assessed as at the date of breach, and the Court has only jurisdiction to award damages in English money. The judge must therefore express those damages in English money, and in order to do so he must take the rate of exchange prevailing at the date of breach.

We have been referred to a considerable number of authorities, and all, with the exception of one English authority and one American authority, seem to me to be in favour of the view taken by Roche J. The one English authority—*Kirsch v. Allen & Co.* (1)—is an earlier decision of Roche J., as to which he says he is not satisfied that it is in conflict with his present decision, but, if it is, he prefers his present decision. The American authority I need not refer to, there being a preponderance of English authority in favour of the view taken by the learned judge.

The first case I need refer to is *Scott v. Bevan* (2), which I think, when understood as I understand it, does not deserve the comment of McCardie J. in *Lebeaupin v. Crispin* (3) upon it, and is an authority in favour of the view of Roche J. in the present case. There the plaintiff recovered judgment in Jamaica, and sued the defendant in England upon that judgment. The judgment was expressed in current money of the island of Jamaica, and the defendant contended that the amount paid into Court at the rate of exchange prevailing at the date of the judgment in Jamaica was sufficient to satisfy the plaintiff's claim. His calculation was based upon the rate of exchange actually existing at the date of the Jamaica judgment. The plaintiff contended that he was entitled to something more than the amount paid into

(1) [1919] W. N. 301; 25
 Com. Cas. 68.

(2) 2 B. & Ad. 78.

(3) [1920] 2 K. B. at p. 724.

Court, because he said that he was entitled to have the rate of exchange calculated according to a conventional rate, and not upon the actual rate. The Court decided that the defendant's view was right, and that the actual rate, and not the conventional rate, was the material one.

Another case which I think is of great importance is *Manners v. Pearson* (1), because, although the facts are different from those in the present case, the statement of the law by Lindley M.R. and Vaughan Williams L.J. is directly in point and governs this case. Lindley M.R. said (2): "The necessity for considering what amount the defendants ought to pay in English money arises simply from the fact that the plaintiff, having the right to sue the defendants in this country for a breach of their contract, has chosen to sue them here instead of in Mexico; and, speaking generally, the Courts of this country have no jurisdiction to order payment of money except in the currency of this country. Whatever sum is ordered to be paid, whether for principal, interest, or damages, must be expressed in English money, or such order cannot be enforced by the ordinary writs of execution." Applying that language to this case it seems to me that Roche J. was bound to express in English money the amount of damages to which the plaintiff was entitled at the date of breach. Vaughan Williams L.J., after referring to *Scott v. Bevan* (3), said (4): "It seems plain that this mode of computing the value of foreign currency in English sterling, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and, if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of the judgment." Nothing could be more in point than that statement of the law by the Lord Justice, which is entirely in accordance with *Scott v. Bevan* (3) and with what I conceive to be the rule on the subject. That view was followed by Bailhache J.

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(1) [1898] 1 Ch. 581.

(2) *Ibid.* 587.

(3) 2 B. & Ad. 78.

(4) [1898] 1 Ch. 592.

C. A. in *Barry v. Van den Hurk* (1), and by McCardie J. in 1920 *Lebeaupin v. Crispin* (2), Bailhache J. saying that the damages are "crystallized" at the date of default. Personally I should rather put it that the judge is under an obligation to express the amount of damages as at that date in English money; but in whatever language it is expressed, I am satisfied that the principle laid down by Vaughan Williams L.J. is right. This appeal must be dismissed.

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SCRUTTON L.J. On this question, which is becoming of great importance owing to the fluctuation in the rates of exchange between various countries, I agree with the views of Bailhache J. in *Barry v. Van Den Hurk* (1) and of McCardie J. in *Lebeaupin v. Crispin* (2), and with the judgment of Roche J. in the present case. I have not had the pleasure of hearing Mr. Schiller reconcile the judgment of Roche J. in *Kirsch v. Allen & Co.* (3) with his judgment in the present case, and therefore I cannot express any opinion about it. Not having heard it, it looks to me as if the first judgment of Roche J. was erroneous.

On principle the matter appears to stand thus: When a plaintiff claims damages for breach of contract to deliver goods in a foreign country at a fixed date, the measure of damages is, if there is a market, the market value of those goods at the place where and on the day when they should have been delivered; and it is immaterial to prove that at the date of the judgment awarding the damages the goods were either worth more or worth less than they were at the date of the breach. If the goods were worth 50*l.* a ton on the day for delivery, it would be irrelevant to prove that they were worth 100*l.* a ton on the day of the judgment. The reason for excluding that evidence is that subsequent fluctuations in the value of the goods which ought to have been delivered are too remote, as a consequence of the original breach, to be taken into account by the Court.

(1) [1920] 2 K. B. 709.

(2) *Ibid.* 714.

(3) [1919] W. N. 301; 25 Com. Cas. 68.

Therefore, shutting out the change in the value of the goods after the date of breach, if the damages have to be assessed in the currency of a foreign country, the Court has to arrive at a figure expressed in foreign currency. An English Court however cannot give judgment in foreign currency, there being no power to enforce such a judgment. Therefore the Court must translate into English currency the figure arrived at as the damages in foreign currency on the date of the breach. Just as the Court has to exclude from the calculation of the damages the subsequent change in the value of the goods after the date of breach, so also it has to exclude the subsequent change in the value of the currency after the date of the breach; and for the same reason—namely, that the changes in the value of the currency are too remote a consequence of the breach to be taken into consideration by the Court. This view of the principle appears to me to be in accordance with all the authorities to which we have been referred except the judgment of Roche J. in *Kirsch v. Allen & Co.* (1) I, like my Lord, think that the comment of McCardie J. (2) on *Scott v. Bevan* (3) proceeds on a misapprehension of the judgment, owing to the report being expressed in somewhat ambiguous terms. In *Scott v. Bevan* (3) an action was brought on a Jamaica judgment for a sum of money, and the defendant paid into Court a sum of money on the basis of the actual exchange at the day of the Jamaica judgment. The plaintiff said that there was a conventional method of turning Jamaica money into English money by a ratio of 7 to 5 irrespective of the actual exchange on any particular date. The defendant said that was wrong, and proved that on October 1, 1827, when the judgment was obtained in Jamaica there was a particular rate of exchange. Lord Tenterden at the trial thought the plaintiff's view of the conventional exchange was the right one. When the matter came before the full Court, Lord Tenterden, delivering the judgment of the Court, though saying that he himself was still not quite

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(1) [1919] W. N. 301; 25 Com.
Cas. 68.

(2) [1920] 2 K. B. 724.

(3) 2 B. & Ad. 78.

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sure that his original view was not right, gave judgment in favour of the defendant's view. What had been proved was the rate of exchange at the date of the Jamaica judgment, and I think that the comment of McCardie J. proceeds on the misapprehension that the date of the judgment means the date of the English judgment and not, as appears to be clear, the date of the Jamaica judgment.

There is one thing more I wish to say. In some cases of non-payment of money the plaintiff recovers interest by agreement; in other cases, where there is no agreement for payment of interest, and the case cannot be brought within any statute giving a right to interest, interest may yet be awarded by way of damages for the failure to pay on the agreed day. The matter is explained by the House of Lords in *Cook v. Fowler* (1), and also by Bowen L.J. in *London, Chatham and Dover Ry. Co. v South Eastern Ry. Co.* (2) It occurred to me it might possibly be that subsequent variation in the exchange could be included in the damages, in the nature of interest. I have been unable to find that interest by way of damages has ever been allowed to cover alteration in the exchange, and counsel have also been unable to find any such case. I think the reason is the one that I have already given—namely, that those damages are too remote. The variation of exchange is not sufficiently connected with the breach as to be within the contemplation of the parties. That seems to me to be the principle on which the matter should be dealt with, and without going through the authorities, that is the rule that should be followed, and it is the rule laid down by three judges of great experience in the King's Bench Division.

EVE J. I think that the principle applicable in this case is to be found in *Scott v. Bevan* (3), and is explained in language more lucid and more apposite than any I can employ by Vaughan Williams L.J. in *Manners v. Pearson*. (4) In particular the sentence which my Lord has read, and which

(1) (1874) L. R. 7 H. L. 27.

(2) [1892] 1 Ch. 120, 146, 147.

(3) 2 B. & Ad. 78.

(4) [1898] 1 Ch. 592.

I will not read again, seems to dispose of the argument that the date on which the value of the foreign currency in English sterling is to be ascertained is the date of the judgment and not of the breach. I think it is clear that the Lord Justice took the view that *Scott v. Bevan* (1) had determined that the real date was the date of the breach. I agree that this appeal fails, and should be dismissed.

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Appeal dismissed.

Solicitors for plaintiff: *Crosley & Burn.*

Solicitors for defendants: *William A. Crump & Son.*

W. F. B.

In re No. 4, PORCHESTER GATE, PADDINGTON.

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JOHNSTON *v.* MACONOCHIE AND OTHERS.

Local Government—Housing—Conversion of House into Flats—Flats unsuitable for Persons of Working Class—Restrictive Covenant—Jurisdiction of County Court to vary Covenant—Housing, Town Planning, &c., Act, 1919 (9 & 10 Geo. 5, c. 35), s. 27.

Sect. 27 of the Housing, Town Planning, &c., Act, 1919, provides: "Where it is proved to the satisfaction of the county court on an application by the local authority or any person interested in a house that, owing to changes in the character of the neighbourhood in which such house is situate, the house cannot readily be let as a single tenement but could readily be let for occupation if converted into two or more tenements and that, by reason of the provisions of the lease or of any restrictive covenant affecting the house or otherwise, such conversion is prohibited or restricted, the Court . . . may vary the terms of the lease or other instrument imposing the prohibition or restriction so as to enable the house to be so converted. . . ."

Held, that that section is not restricted to the case in which it is proved that the house if converted into tenements could readily be let for occupation by persons of the working class, but is of general application, and applies where it is shown that it could be let for occupation by persons of any class.

APPEAL from Marylebone County Court.

By an indenture dated March 16, 1920, and made between

(1) 2 B. & Ad. 78.

1920 the personal representatives of J. L. Margerison, of the one
JOHNSTON part, and James S. Johnston, hereinafter called the applicant,
v. of the other part, which recited an agreement for the sale by
MACONOCHIE the former to the latter of the house thereby assured sub-
ject as therein provided, the parties of the first part, in
consideration of 5000*l.* then paid by him to them, thereby
granted to the applicant the house No. 4, Porchester Gate,
Paddington, in the County of London, to hold unto and to
the use of the applicant his heirs and assigns for ever, subject
to and with the benefit of a mutual covenant contained in
indentures of earlier date by one of which the then owner
of the above-mentioned house and the then owner of the
houses Nos. 3, 6 and 7, Porchester Gate, as to each of these
houses, and by another of which the then owner of the above
house and the owner of No. 8, Porchester Gate, mutually
covenanted that no alteration should be made in the archi-
tectural elevation of such portion of the said mansions
respectively as fronted on the Uxbridge Road and further
that the said mansions respectively should not be used for
a school or boarding house or for any trade or business or
“otherwise than as a private residence.”

The applicant was desirous of effecting a conversion of the house into four self-contained private residential maisonettes or flats, but was apprehensive that the above-mentioned covenant might prohibit or restrict the desired conversion.

He therefore made an application to the county court under s. 27 of the Housing, Town Planning, &c., Act, 1919 (1), claiming that the above covenant might be varied so as to enable the proposed conversion to be effected.

The respondents to the application were the owners of the neighbouring houses who were entitled to the benefit of the covenant.

On April 1, 1920, the application was heard in the county court. It then appeared that with the exception of Mr. A. W. Maconochie, the freeholder of No. 8, Porchester Gate, each of the respondents had given his or her consent to the proposed conversion of the applicant's house into flats.

(1) The section is set out in the headnote.

Evidence was brought on behalf of the applicant to show that formerly the house in question and the other houses in Porchester Gate and its vicinity were all occupied by persons of means and social position, the selling price of the houses being then from 8000*l.* to 10,000*l.* each ; that within the last ten years or thereabouts the neighbourhood had become less popular with persons of that class, and its character had consequently changed, some of the houses having been converted into hotels or boarding houses, others having been divided into flats, and others remaining empty, and the selling prices having fallen ; that the rateable value of these houses was about 360*l.* ; that the house in question had been empty for three years, that it would be very difficult to let it as a single dwelling house, but that if it were converted into residential flats these could readily be let ; that the applicant had purchased the house in question for 5000*l.*, and that he desired to convert it into four maisonettes or flats, one of which he would occupy himself and the others of which he hoped to let for 350*l.* or 400*l.* a year in all.

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On behalf of the respondents the objection was taken that the county court had no jurisdiction under s. 27 to grant the application, inasmuch as, read in connection with the rest of the Act, that section on its true construction only applied where it was shown that the house if converted into tenements could readily be let for occupation by persons of the working class, and here it was obvious that the proposed flats would not be suitable for persons of that class.

The county court judge, without hearing the respondents' case on the merits, held that s. 27 gave him no jurisdiction and dismissed the application.

The applicant appealed.

Foà (*Holman Gregory K.C.* and *R. Turnbull* with him) for the appellant. The county court judge had jurisdiction under s. 27 of the Housing, Town Planning, &c., Act, 1919, to relieve the appellant from the restrictive covenant and enable the house to be converted into flats. The section on its true construction is not limited to cases where the house as to which

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the application is made, or the tenements into which it is to be converted, are intended for the occupation of persons of the working classes, but applies to houses in general. The expression "working class" is defined for the purposes of the Housing Acts in the Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), Sch., clause 12 (e); and the expression "houses for the working classes" is defined in the Act of 1919, s. 40. It is true that the title of the Act of 1919 states that it is an Act to amend the enactments relating (inter alia) to "the housing of the working classes"; that each of the earlier Housing of the Working Classes Acts, 1890 to 1909, states in its title that it is to amend the law relating (inter alia) to "the housing of the working classes"; and that Part I. of the Act of 1919 in which s. 27 is included is headed "Housing of the Working Classes"; but it does not follow that s. 27 is limited to houses for the working classes. Where a statute is expressed in clear and unambiguous terms, the title, preamble, or heading of the statute cannot be referred to for the purpose of construing it: per Lord Halsbury L.C. and Lord Davey in *Powell v. Kempton Park Racecourse Co.* (1) Thus, for example, the statute of 1774 (14 Geo. 3, c. 78), according to its title is a local London Act for the regulation of buildings and the preventing of mischiefs by fire, and almost all its sections were limited to the metropolis; yet s. 83 (unrepealed) has been held to be of universal and not local application: *Ex parte Gorely* (2); and s. 86 (unrepealed) has likewise been applied outside the metropolis: *Filliter v. Phippard*. (3) Sect. 27 of the Act of 1919 is clear and unambiguous, and according to the plain meaning of its terms it applies to all houses in general. Even if that section be somewhat ambiguous, there is nothing in the general scheme of the Act of 1919, or of any of the earlier housing Acts, or in any of the provisions of these Acts, which would justify the limitation of the section to houses for the working classes. Each of the Housing Acts, 1890 to 1919, as appears from its provisions, relates no less to public health than to the

(1) [1899] A. C. 143, 157, 184,
185.

(2) (1864) 4 D. J. & S. 477.

(3) (1847) 11 Q. B. 347.

housing of the working classes. Sect. 75 of the Act of 1890 (53 & 54 Vict. c. 70) provides that on the letting of a house for "persons of the working classes" there shall be implied a condition that it is reasonably fit for habitation; and s. 14 of the Act of 1909 (9 Edw. 7, c. 44) extends that provision with the omission of these words, showing that the condition is to be implied in favour of any person whether belonging to the working classes or not. Sect. 17 of the Act of 1909, which imposes a duty upon the local authority to prohibit the use of a dwelling house which is unfit for habitation, is not restricted to persons of the working class. In the Act of 1919, Part I. is no doubt headed "Housing of the Working Classes," but the fact that in many of the sections the houses referred to are described as houses "for the working classes," clearly shows that the sections in which houses are referred to but not so described, apply to all houses. Among the sections in which houses for the working classes are mentioned are s. 12 giving the local authority additional powers of acquiring land and houses for these classes; s. 26 relating to bylaws as to houses for occupation by the working classes; s. 28 empowering the local authority to require repairs to houses of that kind; ss. 29 and 30 containing further provisions with a view to keeping houses of that kind fit for habitation; and s. 31 extending to a tenant for life under the Settled Land Acts power to convey land absolutely for the erection of dwellings for the working classes. The Act by ss. 12, 26, and other sections gives to the local authority large powers of providing and regulating buildings, but that does not imply, as the county court judge apparently thought, that all sections of the Act are limited to houses for the working classes. It was advisable that the applicant should make this application to be relieved from the restrictive covenant. In *Day v. Waldron* (1) it was held that a lessee by converting a house into flats broke a covenant not to use the house except as a private dwelling house. It is submitted that that case was wrongly decided, inasmuch as it followed *Rogers v. Hosegood* (2), which

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(1) (1919) 88 L. J. (K. B.) 937.

(2) [1900] 2 Ch. 388.

1920 was not a case of landlord and tenant, but of adjoining
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Sect. 27 of the Act of 1919 is not of general application, but is limited to houses for the working classes. That section construed apart and by itself is not clear and unambiguous. Its terms are meaningless and even ridiculous unless explained. "House" is so wide a term as to be ambiguous unless defined for the purpose of the section; "tenement" means a holding of real property: see Stroud's Judicial Dictionary, tit. "Tenement," and is not a house or part of a house, and it should be shown how a house can be divided into tenements; and "occupation" may either mean occupation by a certain class of tenant or by any one. That being so the section must be construed in the light of the other provisions of the Act of 1919 and the other Housing Acts. It appears by reference to these other provisions that the section is limited to working class houses. The section occurs in the Act of 1919, which is entitled "An Act to amend the enactments relating to the housing of the working classes," and in Part I. of that Act which is headed "Housing of the Working Classes." The title of each of the earlier Acts states that it is an Act relating to the housing of the working classes, and s. 52, sub-s. 2, of the Act of 1919, provides that all the Acts may be cited together as the "Housing Acts, 1890 to 1919." It is true that one of the objects of the Acts is the improvement of the public health, but there is no better means of promoting that object than by improving the housing of the working classes. All the sections of the Act of 1919 are limited to houses for the working classes. By s. 1 of that Act every local authority is required to prepare a housing scheme. By s. 8 powers are given to county councils in connection with the housing of their employees. By ss. 9 to 13 powers are given to local authorities for the acquisition and disposal of land and buildings in connection with the housing of the working classes. In ss. 18 to 23 there are provisions for the assistance of public utility societies, housing trusts, and others engaged in promoting the housing of the working classes.

Sects. 24 and 25 relating to the relaxation of bylaws, though not in terms limited to houses for the working classes, are applicable to housing schemes for the benefit of these classes. The latter of these sections is of temporary operation and should receive a narrow rather than a general construction. Sect. 26 contains miscellaneous provisions as to houses intended or used for occupation by the working classes, and sub-s. 9 of that section relates to the case where a local authority has acquired a leasehold interest in a house under a scheme for the benefit of these classes and desires the relaxation of the provisions of the lease. In order that it may be consistent with the scheme and the other sections of the Act, s. 27 must likewise be construed as limited to houses for the working classes. That section speaks of the application thereunder being made by the local authority or any person interested in a house. It is supplementary to s. 26, sub-s. 9, and it relates to the case in which a local authority has acquired an interest other than a leasehold interest in a house under a scheme for the benefit of the working classes and seeks the relaxation of restrictive covenants. The "other person" referred to is any other person interested in a house on behalf of the working classes. If s. 27, instead of being a separate section, formed an additional sub-section of s. 26, there could be no doubt that this was its true construction. The term "house" in the section means any house which can no longer be let as a whole, but only in parts suitable for the working classes; and "tenement" has reference to the character of the occupation, applying, where it first occurs in the section, to the occupation of the house as a whole, and, where it next occurs, to the occupation of the house in separate parts: see s. 53 of the Act of 1890. It must perhaps be admitted that s. 32 is not limited to houses for the working classes. In s. 14 of the Act of 1909 the house is not stated to be "for the working classes," because it is desired to make the condition of fitness for habitation apply to the house provided only that it is of the specified rental. For the purpose of certain provisions of the Housing Acts, the expression "working classes" is defined by the Settled Land Act, 1890 (53 &

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54 Vict. c. 69), s. 18, as including all classes of persons who earn their livelihood by wages or salaries.

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SALTER J. This appeal raises, apparently for the first time, a question of some general importance as to the construction of s. 27 of the Housing, Town Planning, &c., Act, 1919. An application was made to the learned county court judge under that section by a private person, who is the owner of a large house in Bayswater, for an order to relax a restrictive covenant with a view to the conversion of the house into four residential flats from which he anticipates that a rent of from 300*l.* to 400*l.* might be got. The objection was taken on behalf of the respondent that the county court had no jurisdiction to deal with the matter on the ground that s. 27 was restricted to dwellings suitable for, or which would when adapted be suitable for, habitation by persons of the working class. The county court judge, after hearing argument on both sides, allowed the objection on that ground and declined jurisdiction.

The question is whether the learned judge in so doing attributed the right meaning to the section. The view which prevailed with him and which counsel for the respondents urged before this Court is that the section should be read as though the words "by persons of the working class," or other similar words, were inserted immediately after the words "for occupation" which occur towards the middle of the section. This view was based partly upon the title of the Act of 1919, but also, and, as I think, more reasonably, upon the general purport of that Act and of the other Acts with which it forms a series—namely, the Housing of the Working Classes Act, 1890, the Housing, Town Planning, &c., Act, 1909, and this Act of 1919. In considering how far regard may be had to the preamble and the object of a statute for the purpose of construing its language, I think the principle to be applied is that which was referred to by Lord Halsbury L.C. and Lord Davey in *Powell v. Kempton Park Racecourse Co.* (1) In that case the effect of the preamble

(1) [1899] A. C. 143.

to a statute upon one of its provisions was strongly pressed in argument before the learned Lords. Lord Halsbury L.C. in the course of his judgment observed (1): "It has, indeed, been argued that the history of the legislation and of the facts which gave rise to the enactment may in view of the preamble affect the construction of the Act itself; but though I do not deny that such topics may usefully be employed to interpret the meaning of a statute, they do not, in my view, afford conclusive argument here. Two propositions are quite clear—one that a preamble may afford useful light as to what a statute intends to reach, and another that, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment; and in this case it appears to me that the question must be decided upon the words of the statute." Lord Davey, in the same case, referring to the same argument, said (2) that he thought that it was founded on an exaggeration of the facts in that case, and continued: "but, further, I am of opinion that the argument itself is illegitimate if it is sought thereby to cut down the language of the enactment according to its plain and natural meaning, or to restrict the enactment to the particular matter set forth in the preamble. 'Undoubtedly,'—I quote from Chitty L.J.'s judgment words with which I cordially agree—'it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms.'" Lord Davey proceeds (3): "But the preamble is a key to the statute, and affords a clue to the scope of the statute when the words construed by themselves without the aid of the preamble are fairly capable of more than one meaning. There is, however, another rule or warning which cannot be too often repeated, that you must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital. To do so would in many cases frustrate the enactment and defeat the general intention of the Legislature."

Applying these observations to the present case, I think

(1) [1899] A. C. 157.

(2) Ibid. 184.

(3) Ibid. 185.

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that there is no ambiguity in the section under consideration, and, that being so, it follows, as indeed was eventually admitted by counsel for the respondents, that the section must be construed according to its plain terms, and that its meaning ought not to be affected by the headings of the Act to which it belongs and of the other Acts to which I have referred, or even by the more important consideration of the general tenor and intention of these Acts. I have said that I think there is no ambiguity in the section, but, apart from that, I can find nothing either in the Act in question or in the other Acts which would justify the introduction into this section of the restrictive words which it is sought to bring into it. It is true that Part I. of this Act is headed "Housing of the Working Classes," and that the sections included in that part of the Act in so far as they deal with dwellings, deal for the most part only with dwellings for the working classes. On the other hand some of these sections not only make no mention of dwellings for the working classes, but from the nature of their provisions do not appear to be limited to dwellings for these classes. I much doubt whether s. 13 or s. 15 can be said to be restricted to dwellings of that kind. It is clear that s. 14 of the Act of 1909 is not so restricted, and it is admitted on behalf of the respondents, and I think the admission is important, that s. 32 of the Act of 1919 is not so restricted. It seems to me to be no less clear that s. 27 is not so restricted.

For these reasons I do not think we are justified in construing s. 27 otherwise than according to the natural meaning and implication of its words.

I am therefore unable to agree with the learned county court judge in his reading of the section, and I think the matter must go back to him to be dealt with by him upon the merits.

ROCHE J. I agree with my learned brother both in the conclusion at which he has arrived and in the reasons on which it is founded, and I merely desire to add one or two further observations.

I dissent with some diffidence from the learned county court judge, whose judgment was carefully prepared. At the same time I have reasons which I cannot disregard for arriving at the opinion that s. 27 of the Act of 1919 is not limited to houses for the working classes.

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In the first place I think this appears from the language used. When the Legislature meant to restrict the operation of any section of this Act or of any of the earlier Housing Acts to houses suitable for the working classes, it was careful to insert the necessary limiting words. Many sections of the Acts contain these words. The section in question, which is clear and unambiguous, does not contain these words, and in my opinion that tends to show that it is not meant to be subject to the restriction.

In the next place the section though unlimited would not necessarily be inconsistent with the object of the Act. Counsel for the respondents were no doubt right in their contention that the main object of the Act is to increase the available accommodation for persons of the working class. As incidental and ancillary to that main object, however, one can understand that it may be necessary and desirable to increase housing accommodation generally. The earlier Act of 1909 deals in general with houses for the working classes, but a particular section, namely, s. 14 of that Act is applicable to the houses of persons who do not belong to these classes.

Lastly, a provision of this nature might be very necessary even though the premises were not suitable or intended for workmen's dwellings. This is illustrated by the case of *Day v. Waldron* (1), which was decided shortly before this Act was passed, and was quoted to us by counsel for the appellant. In that case the lessee of a house who had covenanted not to use it except as a private dwelling house converted it into flats which he let to sub-tenants, and it was held on general principles of law that he was not entitled to do so. Although persons of the working class could hardly be expected to occupy the flats into which it is

(1) 88 L. J. (K. B.) 937.

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proposed to divide this house, it is obvious that it might in many cases be very difficult to say for what class of occupiers a house was being divided up into flats. There seems, therefore, to be abundant reason why, in view of the prevailing state of things, there should be in the Act in question a general provision of this kind.

I hold that s. 27 is a general provision, and that on the preliminary point the county court judge was incorrect in his construction of the section, and that the matter should go back to him in order that he may construe the section rightly and deal with the case upon its merits.

Appeal allowed.

Solicitors for the appellant : *Lee & Pembertons.*

Solicitor for the respondent : *F. J. Perks.*

J. R.

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PENRHOS COLLEGE, LIMITED v. BUTLER.

Emergency Legislation—Landlord and Tenant—Notice to quit—Expiry of Notice—Tenant holding over—Acceptance of Rent by Landlord—Waiver of Notice—Increase of Rent, &c. (War Restrictions), Acts, 1915–1919 (5 & 6 Geo. 5, c. 97, s. 1, sub-s. 3; 9 Geo. 5, c. 7; 9 & 10 Geo. 5, c. 90, s. 1).

Where a tenant of a house to which the Increase of Rent, &c. (War Restrictions), Acts apply holds over after the expiry of a notice to quit and pays rent the landlord is not to be taken by accepting it to assent to a renewal of the tenancy on the old terms, for he has no choice but to accept the rent; he could not sue in trespass for mesne profits, for those Acts provide that the tenant notwithstanding the notice to quit shall not be regarded as a trespasser so long as he pays the rent and performs the other conditions of the lease.

Hunt v. Bliss [1919] W. N. 331 followed.

Hartell v. Blackler [1920] 2 K. B. 161 not followed.

Two appeals from county courts raising the same question of law.

DAVIES v. BRISTOW.

Appeal from Bromley County Court.

By an agreement in writing dated July 24, 1916, the plaintiff

H. P. Davies let to the defendant A. H. Bristow a dwelling house at Beckenham, Kent, for the term of three years from June 24, 1916, and so on from year to year until the tenancy should be determined at the end of the third or any subsequent year by either party giving to the other six calendar months' notice in writing at the yearly rent of 45*l.* payable on the usual quarter days, on the terms and conditions that the defendant was to keep the premises in good tenantable order and condition and all eaves, gutters and downpipes and drains cleansed, flushed and free from obstructions, and at the end of the tenancy to deliver up the premises in such good order as aforesaid reasonable wear and tear excepted.

On December 19, 1918, the plaintiff gave the defendant notice to quit and deliver up possession of the premises on June 24, 1919.

Before that notice expired negotiations took place between the parties with a view to the defendant purchasing the house but they were without result. The defendant paid the rent due on the last-mentioned date, but he did not give up possession of the house. On July 4, 1919, the plaintiff wrote to the defendant intimating in effect that he was contemplating making an increase in the rent of the premises, that if the defendant would agree to pay the increased rent the plaintiff might be willing that he should continue to be tenant, but that if he was not willing to do so he would have to leave in September, 1919, and he asked the defendant to consider the matter and to see him again before he served a notice to raise the rent. On July 9, 1919, the plaintiff again wrote to the defendant stating that, without prejudice to his notice terminating the tenancy of June 24 last, he enclosed notice under the Increase of Rent, &c. (War Restrictions), Act, 1915, and the Increase of Rent, &c. (Restrictions), Act, 1919, ss. 2 and 3, of his intention to increase the rent during such time as the defendant remained in occupation, and would be glad to hear that the defendant was prepared to give up possession. The enclosed notice purported to be made under these Acts and to increase the rent as from August 9, 1919, to 49*l.* 10*s.* per

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annum, being an increase of 10 per cent. over 45*l.*, and appended to the notice there was a note informing the defendant that he had a right under the last above-mentioned Act to apply to the sanitary authority for a certificate that the house was not kept in a reasonable state of repair. On September 28, 1919, the defendant wrote to the plaintiff enclosing a cheque for 11*l.* 5*s.* for the Michaelmas quarter's "rent" at the rate of 45*l.* a year. On October 9 the plaintiff wrote to the defendant acknowledging the cheque, which he kept, but requesting an additional sum of 1*l.* 2*s.* 6*d.*, which represented the 10 per cent. increase on the quarter's rent. On October 12 the defendant wrote that if the last-mentioned sum referred to increased rent it did not apply to these premises. On October 16 the plaintiff's solicitors wrote to the defendant asking him to explain why the increase of rent did not apply to the house in question, and stating that, unless he paid the increased rent they were instructed to commence proceedings against him.

On October 25, pursuant to an application in that behalf made by the defendant to the Beckenham Urban Council as the sanitary authority for the district, a certificate under the Increase of Rent, &c. (Restrictions), Act, 1919, s. 2, was signed on behalf of the Council by their clerk that the house in question was not kept in a reasonable state of repair.

On November 18, 1919, the plaintiff brought the present action against the defendant in the Bromley County Court claiming possession of the house on the ground that the tenancy thereof was duly determined by the above-mentioned notice to quit, and mesne profits at the increased rate; and in the alternative possession of the house on the ground of forfeiture by reason of the non-payment by the defendant of the said sum of 1*l.* 2*s.* 6*d.*

On January 2, 1920, the defendant wrote to the plaintiff enclosing a cheque for 11*l.* 5*s.* for the quarter's rent to December, 1919, at the original rate, but on the following day the plaintiff returned that cheque.

The action was tried in the county court on January 8 and March 9 and 15, 1920.

On the last-mentioned date the county court judge gave judgment. He was of opinion that by virtue of s. 1 of the Act of 1919, s. 2 of that Act empowering a landlord to make an increase in the rent would not come into force until the end of the war, an event which by the Termination of the Present War (Definition) Act, 1918 (8 & 9 Geo. 5, c. 59), was not to be treated as having occurred until an Order in Council declaring the war at an end had been made. He did not think that the plaintiff's notice to increase the rent was evidence of a new tenancy. He came to the conclusion, though with some hesitation, that the plaintiff by accepting rent after the expiration of the notice to quit had not waived the notice or renewed the tenancy. He found that the defendant had refused to carry out the conditions of the tenancy in regard to repairs, and consequently that the Increase of Rent Acts did not protect him against an order for possession. He gave judgment for the plaintiff for possession in a month with mesne profits at the rate of the old rent to the date of the judgment.

The defendant appealed.

Edgar Dale for the defendant. The plaintiff is not entitled to recover possession of the house.

The plaintiff's acceptance, after the expiration of his notice to quit, of a sum tendered by the defendant as rent constituted a waiver of the notice, or, to speak more precisely, a renewal of the tenancy: *Hartell v. Blackler* (1) and *Goodright v. Cordwent*. (2) As the rent tendered and accepted was at the same rate as before—namely, 45*l.* a year—and as there was no agreement to vary the former terms, the renewed tenancy must be treated as being at the same rent and on the same terms as the expired tenancy. The defendant has performed all his obligations under the expired tenancy and also under the renewed tenancy, by duly paying or tendering the rent and performing his covenants, and the plaintiff therefore is not entitled to re-enter.

Even if the defendant has failed to perform his obligation

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to repair, the plaintiff is prevented by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14, sub-s. 1, from enforcing his right of re-entry until he has served upon the defendant the notice required by that enactment.

It plainly appears from the provisions of the Increase of Rent, &c. (War Restrictions), Act, 1915, s. 5, sub-s. 2, the Termination of the Present War (Definition) Act, 1918, and the Increase of Rent, &c. (Restrictions), Act, 1919, s. 1, that s. 2 of the last-mentioned Act, giving the landlord power to increase the rent, is not to come into force until an Order in Council has been made under the Act of 1918 declaring the war at an end ; and this the plaintiff apparently now admits.

Bell Hart for the plaintiff. The plaintiff is entitled to recover possession of the house.

The notice to quit given by the plaintiff to the defendant was valid and it duly determined the tenancy. The plaintiff thereupon became entitled to possession, unless the defendant could claim the protection of the Rent Restriction Acts. The Act of 1915, s. 1, sub-s. 3, provides in effect that an order for possession may be made where the tenant fails to pay rent or perform the conditions of the tenancy. The defendant has failed to perform the condition of his tenancy that the premises be kept in good tenantable repair, and therefore he is not entitled to the protection of the Acts.

The county court judge has found as a fact that the plaintiff by giving the notice to quit did not intend to renew the tenancy. The plaintiff by accepting a sum tendered as rent after the expiry of the notice to quit did not waive the notice or renew the tenancy. If *Hartell v. Blackler* (1) is an authority to the contrary it ought not to be followed. In *Croft v. Lumley* (2) the Court of Exchequer Chamber no doubt held that retention by a landlord as compensation, of a sum tendered by his tenant as rent, amounted to a waiver of a previous forfeiture by the tenant for breach of covenant ; but in the House of Lords Lord Wensleydale, though he found it unnecessary to decide the point, would seem to have inclined to a different opinion. (3)

(1) [1920] 2 K. B. 161.

6 H. L. C. 672.

(2) (1855) 5 E. & B. 648 ; (1858)

(3) 6 H. L. C. 672, 744, 746.

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The plaintiffs carry on the business of a ladies' school at Colwyn Bay, and in December, 1918, as they were in want of further accommodation for their pupils they bought a house adjoining the school called "Gorway." The defendant was then in the occupation of the house as tenant to the vendor from year to year at a rent of 44*l.* on the terms of a three months' notice to quit on either side to expire on any quarter day except Christmas. Immediately on completing the purchase of the house the plaintiff on December 21 gave the defendant notice to quit, which notice expired at Lady Day, 1919. On the expiry of the notice the defendant paid the rent then due but refused to give up possession until he could find suitable alternative premises. The plaintiffs informed the defendant that the house was urgently wanted for the purpose of the school but offered to allow him to remain on for two months if he would undertake to give up possession then. At the June quarter day the defendant tendered the quarter's rent which the plaintiffs accepted. The plaintiffs continued to press for possession and threatened legal proceedings. The Michaelmas rent was also tendered and accepted, the plaintiffs still pressing for possession. They then offered the defendant another house called "Sunnybank" which was in their own occupation. The defendant declined it on the ground that its position was not suitable for one of his children, who was consumptive. In January, 1920, the plaintiffs commenced this action in the county court for recovery of possession. The county court judge found that there was sufficient "alternative accommodation available for the tenant" within the meaning of s. 1, sub-s. 1 (c), of the Increase of Rent, &c. (Amendment), Act, 1919, and that the defendant was not entitled to the protection of that Act (1),

(1) By s. 1, sub-s. 1, of the Increase of Rent, &c. (Amendment), Act, 1919 (9 & 10 Geo. 5, c. 90): "After the passing of this Act no order or judgment for the recovery of possession of a dwelling house to which the Increase of Rent and

Mortgage Interest (War Restrictions) Act, 1915 (hereinafter called the principal Act), or any of the Acts amending the same applies, or for the ejectment of a tenant therefrom, shall be made or given, so long as the tenant continues to pay rent at the

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but he considered himself bound by the decision in *Hartell v. Blackler* (1) to hold that the plaintiff by accepting the rent accrued since the expiry of the notice had waived it. He accordingly gave judgment for the defendant. The plaintiffs appealed.

Montgomery K.C. and *Clothier* for the plaintiffs. The county court judge was wrong in holding that he was bound by *Hartell v. Blackler*. (1) That was a decision only on the common law. The rent there was no doubt within the limit specified in the Increase of Rent, &c., Act, but the judge did not decide the case on that ground or in any way deal with that Act, and in the Divisional Court it was not discussed, no counsel appearing for the respondent. The effect of that Act upon the position of a tenant whose term has been determined by notice to quit is that by holding over after the expiry of the notice he does not become a trespasser, but is entitled to remain in possession so long as he pays the agreed rent and performs the other conditions of the lease. He acquires, as was said in *Hunt v. Bliss* (2), a statutory tenancy. That being so the supposed rule of the common law that a landlord who accepts rent accrued due after the expiry of the notice thereby waives the notice, or rather agrees to a new tenancy on the terms of the old one, can have no application, for that rule was based on the principle that a landlord who did not wish the tenancy to continue ought to refuse any money tendered as rent and sue the tenant in trespass for mesne profits. Whereas in a case under the Act the landlord has not got that remedy, the tenant not being a trespasser. He has no choice but to accept the rent. Consequently no inference can be drawn from his acceptance of the rent that he assents to a renewal of the tenancy. Then

agreed rate as modified by the principal Act or any of the Acts amending the same and performs the other conditions of the tenancy, unless . . . ; (c) the premises are reasonably required by the landlord for the occupation of himself . . . and the Court, after considering all the cir-

cumstances of the case, including especially the alternative accommodation available for the tenant, considers it reasonable to make such an order or give such judgment."

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(2) [1919] W. N. 331.

if *Hartell v. Blackler* (1) is out of the way the plaintiffs are entitled to judgment, for the county court judge found that there was sufficient alternative accommodation available for the tenant.

McCleary for the defendant. The facts of this case are on all fours with those of *Hartell v. Blackler* (1), and that being so this Court ought to follow that decision, as one Divisional Court cannot overrule another.

LUSH J. As these two cases raise the same point, we think it convenient to deal with them together in the same judgments.

In the first case, *Davies v. Bristow*, the defendant appeals from a judgment of the judge of the Bromley County Court in favour of the plaintiff in an action for possession of a dwelling house and mesne profits. [His Lordship stated the facts of that case substantially as above set out, observing that the notice of July 9, 1919, by which the plaintiff purported to increase the rent of the house, had been served under an entire misapprehension, the time not having yet arrived at which the provisions of the Increase of Rent, &c. (Restrictions), Act, 1919, s. 2, with regard to the increase of rent could be exercised; that as to the proviso in that section that the increased rent shall not be recoverable if the sanitary authority certifies that the house is not kept in a reasonable state of repair, one would at first suppose that that referred to cases in which the landlord was bound to repair, but the section was wide enough in its terms to cover the case in which the tenant was bound to repair; that it was, however, unnecessary to discuss the matter further, as no point could at present be made of it, and none had in fact been made; and his Lordship then continued:] Upon the facts which I have stated two material contentions were raised on behalf of the defendant. The first of these contentions was that the notice to quit had been waived by the acceptance by the plaintiff of rent after the notice to quit had expired, and also by the service by the plaintiff

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of the notice that he was increasing the rent which it was said could only be served upon the defendant on the footing that he was still the plaintiff's tenant. The second contention was that the defendant could not be evicted because he had performed his obligations under the tenancy agreement. I would point out that both under the Act of 1915 and the Act of 1919 it is made a condition precedent to the right of a tenant to claim the protection of the Act, that he should have paid the rent and performed his obligations under the tenancy agreement. As regards this contention the county court judge said: "I therefore feel bound to find that the defendant deliberately refused to carry out the conditions of the tenancy and had so refused for a considerable period with substantial injury to the plaintiff, and in my view he does not therefore come within the section which protects him from an order for recovery of possession."

That therefore left as the only point to be considered the first contention—namely, that the notice to quit had been waived. That contention is common to both the cases with which we are now dealing. In both of them the county court judge held that the defendant was not entitled to the protection of the Act, and therefore if the notice had not been waived the plaintiff was entitled to an order for possession. If it had been waived his action must fail. It was contended that the matter was concluded in the defendant's favour by *Hartell v. Blackler*. (1) There the defendant who held on a weekly tenancy at a rent of 4s. a week was served with notice to quit. On expiry of the notice he refused to give up possession. Later on he tendered rent which had accrued subsequently to the expiry of the notice. The plaintiff's solicitor accepted the money but at the same time stated that he retained it on account of the use and occupation of the premises and not as rent, and refusing to recognize the defendant as tenant. In an action for recovery of possession the county court judge held that the retention of the rent paid, although accompanied by a protest, was an acknowledgment of a tenancy and a waiver of the notice to quit. He therefore

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gave judgment for the defendant. On appeal that judgment was affirmed by the Divisional Court consisting of Bailhache and Sankey JJ. When the second of these two cases was argued yesterday our attention was called to a case which was not cited to the Court in *Hartell v. Blackler* (1)—the case of *Hunt v. Bliss*. (2) The headnote to the Times Law Report (3) is this: "A tenant who holds over after the expiry of his tenancy is not debarred from availing himself of the protection given by s. 1, sub-s. 3, of the Increase of Rent, &c. (War Restrictions), Act, 1915, by the fact that the expiry of his tenancy has been caused by his having given notice to quit." In the course of his judgment Lord Coleridge J. considered what was the position of a tenant who holds over, claiming the protection of the Act, that is whether he was to be regarded as a trespasser or as a tenant, and if a tenant what sort of tenant, and said: "The decision of *Flannagan v. Shaw* (4) was of assistance in showing that, although a notice to quit had been given by the tenant, a statutory tenancy came into existence by reason of the Act on the expiration of the notice to quit." McCardie J. gave judgment to the same effect. That case appears to me to be in direct conflict with *Hartell v. Blackler* (1), where the Court apparently treated the acceptance of rent by the plaintiff as conclusive evidence that the defendant continued to be tenant to the plaintiff under the original tenancy agreement. Whereas, the view in *Hunt v. Bliss* (2) was that he remained in possession under a novel kind of tenancy which Lord Coleridge called a "statutory tenancy." Those two cases being in my opinion irreconcilable I feel at liberty to express my own view as to the correctness of the decision in *Hartell v. Blackler*. (1) With very great respect to the learned judges who decided that case I do not see my way to agree with it. I agree with the view taken by the Court in *Hunt v. Bliss* (2) and for these reasons. The expression "waiver of a notice to quit," though convenient as a description of the position where both landlord and tenant agree that a notice which has expired shall be treated

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(3) 36 Times L. R. 74.

(2) [1919] W. N. 331.

(4) [1919] W. N. 287.

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as inoperative, is an inaccurate expression, and if one attempts to found a proposition of law upon it it is likely to lead one astray. Where a breach of covenant available for forfeiture has been committed by a tenant it is correct enough to say that the landlord can waive the forfeiture, for by the breach of covenant the term is not avoided, it is only rendered voidable at the landlord's option. He can elect whether to affirm or disaffirm the tenancy, and if he by some act evinces an unequivocal intention to affirm it, as by the acceptance of rent with notice of the breach, he cannot afterwards insist on the forfeiture, and no statement made by him at the time of doing that act that he does it without prejudice to his right to re-enter will affect the conclusion that the forfeiture is waived. Now, when one looks at *Hartell v. Blackler* (1) one sees that the authorities which were cited to the Court—namely, *Croft v. Lumley* (2) and *Davenport v. The Queen* (3)—were cases of forfeiture; they were not cases in which the term had been brought to an end by a notice to quit, and in my opinion the principle which is applicable to the former class of cases is not applicable to the latter. When once the notice to quit has expired the position of the parties is precisely the same as it would be if the original lease had provided for the determination of the term on the date mentioned in the notice. There is in that case no room for election by the landlord. The landlord and the tenant may of course agree that a new tenancy shall be created on the old terms, and that is what in effect they do when they agree that the notice to quit shall be waived. But the agreement to continue the tenancy must be proved. It must be shown that the parties were *ad idem* as to the terms. Applying that principle to the first of these two cases—*Davies v. Bristow*—I think it is clear there never was any agreement to create a fresh tenancy on the old terms or on any terms. The plaintiff demanded one sum by way of rent and the defendant offered another. They were never agreed as to the amount of the rent, and there could not therefore be any agreement of

(1) [1920] 2 K. B. 161.

(2) 6 H. L. C. 672.

(3) (1877) 3 App. Cas. 115, 131.

tenancy between them. In this view the acceptance of rent by the plaintiff did not affect the position of the parties. Moreover if the defendant was resisting the plaintiff's demand for possession in reliance upon a statutory tenancy created by the Increase of Rent Acts he was bound to tender the sum which he did as rent, and the plaintiff was entitled to receive it. In accepting rent tendered in circumstances like these a landlord does not prejudice his position or lose the right which he would otherwise have of insisting that the term has come to an end.

I ought perhaps to add that the other point that was raised—namely, that the plaintiff had elected to treat the defendant as his tenant by serving the notice of increase of rent—is equally immaterial. If the acceptance of rent did not prejudice the position, still less would the plaintiff's notice that he required more rent to be paid.

For these reasons I am of opinion that the learned county court judge was right in holding that the defence failed, and that the plaintiff is entitled to an order for possession.

I can now deal with the second case—*Penrhos College v. Butler*—very briefly. There a valid notice to quit was given to the defendant, which expired on Lady Day, 1919. The defendant refused to give up possession, as he could not find another house. The Lady Day rent was paid. The plaintiffs in a letter acknowledging receipt of that rent said they could not admit the defendant's right to retain possession, but that they would allow him, without prejudice, to remain on for another two months if he would definitely undertake to give up possession then. In May they wrote again asking for possession as soon as possible, and in June their solicitors wrote pointing out that they were seriously inconvenienced through not having the house at their disposal. The correspondence went on. The rents which accrued due at Midsummer and Michaelmas were both paid and accepted. In October the plaintiffs' solicitors wrote that unless the defendant would vacate the premises at an early date they must apply to the Court for an order for possession. Ultimately alternative accommodation was found but the defendant still persisted

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1920 . in refusing to give up possession and the action was brought.

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The county court judge found that the alternative accommodation proposed was sufficient, but was of opinion that he was bound by the decision in *Hartell v. Blackler* (1) to hold that the notice to quit had been waived. He therefore gave judgment for the defendant. I have already intimated that in my view *Hartell v. Blackler* (1) was not correctly decided.

The result is that in the first case—*Davies v. Bristow*—the appeal will be dismissed, and in the second—*Penrhos College v. Butler*—the appeal will be allowed.

SHEARMAN J. I am of the same opinion. I agree that the case of *Hunt v. Bliss* (2) is irreconcilable in principle with that of *Hartell v. Blackler*. (1) The result is that this Court is at liberty to form its own opinion as to the correct principles to be applied to each of these cases which have been brought on appeal before it. I have come to the conclusion that the reasoning in *Hunt v. Bliss* (2) is the sounder. As long as s. 1, sub-s. 2, of the Rent Restriction Act, 1915, and s. 1 of the Act of 1919 are in force and a landlord is prevented from getting recovery of possession of premises after the expiration of a notice to quit, I think it is correct to say the former tenant by holding over no longer becomes a trespasser but is in lawful statutory occupation of the premises unless there is proved in fact any other lawful agreement subject to the provisions of the Act, which the landlord and tenant choose to make. I am the more ready to agree with *Hunt v. Bliss* (2) in preference to *Hartell v. Blackler* (1), because I notice that in the latter case the expression “waiver of notice to quit” is used throughout the report. It may be that it is not open to objection if it is clearly understood as referring to an agreement for a new tenancy, but at the same time it cannot be disputed that it is a loose and unscientific expression in that connection. A notice to quit can be withdrawn at any time before the date fixed for the termination of the tenancy. But after the time has expired the lease is at an end and a landlord can no more waive his notice to quit than he can

(1) [1920] 2 K. B. 161.

(2) [1919] W. N. 331.

waive the effluxion of time. I infer that the expression "waiver of notice to quit" wherever it is used in the report merely means that the parties have arrived at a new agreement, but that agreement to be any other agreement must be proved in the ordinary way. I think that what was decided in *Hunt v. Bliss* (1) was this, that after the expiry of the notice to quit the tenant is entitled to continue in occupation under the provisions of the statute until those conditions arise which enable the judge in his discretion to order recovery of possession, or until the parties have arrived at a fresh agreement. The principle of that decision disposes of the question raised in both the present cases. In the first case—*Davies v. Bristow*—after the notice to quit had been served the parties began to negotiate, but they clearly arrived at no agreement. The tenant sent a cheque for 11*l.* 5*s.* in settlement of rent, and the landlord wrote back that the amount due was 12*l.* 9*s.* 3*d.*, and that he would be glad of another 1*l.* 2*s.* 6*d.* to settle the account. Thus they were not agreed as to the terms of the new tenancy. They were contending for tenancies at different rents, and there was no evidence that they had concluded a new agreement. The result to my mind is that the tenant was simply holding under his statutory tenancy, and there was nothing whatever to prevent the landlord, when the circumstances occurred which put an end to that statutory tenancy, for example when the landlord required the premises for his own occupation, or when the statutory conditions of the tenancy ceased to be complied with, from applying for recovery of possession. In my opinion the county court judge was right in the circumstances in giving judgment for the plaintiff.

In the second case—*Penrhos College v. Butler*—there was a longer correspondence in which the plaintiffs were exceedingly courteous and obliging. One is always loath to find anything against people who act with humanity and courtesy, and the only difficulty I felt in that case was as to whether the plaintiffs were not so courteous that there was in fact another agreement arrived at. On looking carefully into

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the correspondence I come to the conclusion that the letters simply meant that the landlord was recognizing the statutory occupation and the tenant was accepting that position and there was no agreement. If there was it really does not alter the case, because if you can spell an agreement out of the letters it was merely an agreement by the landlord to allow the tenant to remain in possession at the same rent until alternative accommodation was found, and when that was found he gave him notice to go.

The result in my opinion is that in neither case was any new agreement entered into. In the first case the judge rightly ordered recovery of possession and we cannot interfere with his decision. In the second case the judge although desirous of ordering recovery of possession felt himself bound by the case of *Hartell v. Blackler*. (1) This Court, for the reasons which it has given, does not feel itself bound by that case, and is entitled to disregard it, having regard to *Hunt v. Bliss* (2) and the principles applicable to the case.

The result is, in the first case, the appeal will be dismissed and in the second case the appeal will be allowed.

Judgment accordingly.

In *Davies v. Bristow* :—

Solicitor for appellant : *Harry Watkins*.

Solicitors for respondent : *H. P. Davies & Son*.

In *Penrhos College v. Butler* :—

Solicitors for appellants : *Jacques & Co., for Dodds, Ashcroft & Cook, Liverpool*.

Solicitors for respondent : *Sharpe, Pritchard & Co., for Porter, Amphlett & Co., Colwyn Bay*.

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(2) [1919] W. N. 331.

ALLISON AND OTHERS v. SCARGALL.

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June 9.

[1920. A. 643.]

Landlord and Tenant—Tenancy from Year to Year—Duration—Notice to Quit of less than usual Length—Termination otherwise than by Notice—Repugnancy.

It is not repugnant to the nature of a tenancy from year to year to include a provision that it be determinable by a notice to quit less than six months in length ; or by notices to quit by the landlord and tenant respectively which are unequal in length ; or by notice to quit by either party and also in some other way depending upon the discretion of one of the parties only, as, for example, on the sale of the premises by the landlord.

A farm being in the occupation of T. as tenant from year to year subject to the usual six months' notice to quit on either side, and his tenancy being about to expire, an agreement was entered into in February, 1915, between the plaintiffs, who were the owners of the farm, and the defendant, by which the latter engaged "to become tenant of the farm . . . now occupied by Mr. T. from the 6th day of April next . . . upon the same terms as he is now tenant until the 6th day of April, 1916, or such later date being the 6th day of April immediately following the sale of the farm." The defendant took possession of the farm under the agreement. The plaintiff sold the farm in October, 1919. The defendant refused to give up possession on April 6, 1920, and the plaintiffs brought an action against him for possession :—

Held, that the agreement, on its true construction, was for a tenancy from year to year, determinable by the usual six months' notice to quit by either party, or on the April 6 which next followed the sale of the farm by the lessors ; that the last-mentioned mode of determining the tenancy was not repugnant to the nature of a tenancy from year to year ; that in the circumstances the tenancy was duly determined on April 6, 1920, and that the plaintiffs were entitled to possession of the farm.

Doe v. Browne (1807) 8 East, 165 distinguished.

ACTION set down for trial under Order XIV., r. 8.

The plaintiffs were the owners of a farm called Moore's Maltby Farm in the parish of Maltby-le-Marsh in the county of Lincoln containing about 245 acres. For some years down to April 6, 1915, the farm was occupied by one Twigg on the terms (inter alia) that he should be deemed to be a tenant from year to year, and that s. 33 of the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), which

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requires a year's notice instead of six months' notice for the determination of a lease from year to year, should be excluded. In 1914 the plaintiffs advertised the farm for sale, but on the outbreak of the war on August 4 of that year they withdrew their offer to sell it. In February, 1915, in view of the approaching termination of Twigg's occupation, Mr. Aner Scargall, the defendant, approached Mr. Allison, one of the plaintiffs, who was a solicitor acting as such for his co-plaintiffs and himself, with the object of obtaining a tenancy of the farm, and negotiations thereupon took place between them.

The result was that an agreement in writing dated February 17, 1915, was entered into by the plaintiffs and the defendant, by which the latter undertook "to become tenant of the farm . . . now occupied by Mr. Twigg from the 6th day of April next at the same rent and upon the same terms as he is now tenant until the 6th day of April, 1916, or such later date, being the 6th day of April immediately following the sale of the farm." On April 6, 1915, the defendant took possession of the farm under the agreement and continued to hold it. The rent paid by the defendant for the farm was 322*l.* 10*s.* per annum until April 6, 1916, when it was reduced by agreement to 315*l.* 10*s.*

The plaintiffs sold the farm as to part in August, 1919, as to part in September, 1919, and as to the remainder on October 17, 1919, and on the last-mentioned date notice of the sale was given to the defendant. Notwithstanding the sale of the farm, the defendant declined to give up possession thereof.

On April 27, 1920, the plaintiffs brought the present action against the defendant on a specially indorsed writ claiming possession of the farm on the ground that under the agreement of February 17, 1915, by reason of the sale of the farm on the dates above specified, the defendant's tenancy had expired on April 6, 1920.

The plaintiffs took out a summons for judgment under Order xiv., and made an affidavit in support thereof.

The defendant in his affidavit in answer stated in substance

that the term of the tenancy constituted by the last-mentioned agreement was indefinite and dependent upon the happening of a future event, and that the agreement was therefore void for uncertainty; that he held the farm as a yearly tenant subject to one year's notice to quit expiring on April 6 in any year; and that no valid notice to quit had been given by the plaintiffs.

The Master made an order giving the defendant leave to defend and directing that the action be entered for trial in the Short Cause list at the plaintiffs' instance.

Hollis Walker K.C. (A. E. Woodgate with him) for the plaintiffs. The plaintiffs are entitled to recover possession of the farm from the defendant. The agreement between the plaintiffs and the defendant embodies the terms on which the former tenant held the farm and adds additional terms of its own. The agreement on its true construction created a tenancy from year to year commencing on April 6, 1915, determinable by the usual six months' notice to quit expiring at the end of a year given by either party, but determinable also in any year after 1916 on the April 6 immediately following the sale of the farm by the plaintiffs. The tenancy thus created is an ordinary tenancy from year to year determinable by either party by the usual notice to quit and also in consequence of the occurrence of a certain event. It is a tenancy which is not indefinite and uncertain, but definite and certain and of a kind which is well understood. This case is distinguishable from *Great Northern Ry. Co. v. Arnold* (1), where the tenancy was a tenancy for the period of the war, which has no resemblance to a tenancy from year to year determinable on the occurrence of an event. The plaintiffs completed the sale of the farm in October, 1919, and therefore by the terms of the agreement the tenancy terminated automatically on April 6, 1920. The plaintiffs admit that no valid notice to quit was given to the defendant.

J. B. Matthews K.C. (A. Lawton with him) for the defendant.

(1) (1917) 33 Times L. R. 114.

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The plaintiffs are not entitled to possession of the farm. It is essential to the validity of any lease that the duration of the term be certain either by express limitation at the time when the lease is made or by reference to some collateral matter which is either certain or capable of being rendered certain before the lease takes effect: Foà on Landlord and Tenant, 4th ed., p. 106; Bac. Abr., tit. "Leases" (L. 3); Shep. Touch. 274, 275; *Say v. Smith* (1); *Bishop of Bath's Case* (2). A tenancy from year to year like other tenancies must be of certain duration in that it must be determinable by a regular notice to quit given at a fixed time before the end of a year by either of the parties, and a provision that it be otherwise determinable is repugnant to and inconsistent with the nature of the tenancy: see per Lord Ellenborough C.J. in *Doe v. Browne* (3) and per Cleasby B. in *Wood v. Beard* (4). Thus in a tenancy from year to year a provision is repugnant that the lessor shall not turn the tenant out so long as he performs his obligations as tenant: *Doe v. Browne* (3), or so long as the lessor has power to let: *Wood v. Beard*. (4) The agreement between the plaintiffs and the defendant no doubt incorporated the terms of the previous tenancy which were those of a yearly tenancy determinable by either party by the usual six months' notice to quit, but it added a further term that the tenancy should be determined on a sale of the property by the lessors. The introduction of that term rendered the duration of the tenancy wholly uncertain, inasmuch as it made it dependent upon the happening of an event which might take place at any time or never at all, and which was in the discretion of the lessors alone. That term is repugnant to the nature of a tenancy from year to year and renders the tenancy void, or at all events is itself void and unenforceable and should be disregarded.

A tenancy from year to year cannot at common law be determined by either party except by a six months' notice

(1) (1530) 1 Plow. 269, 273.

(2) (1605) 6 Rep. 34b, 35b.

(3) 8 East, 165.

(4) (1876) 2 Ex. D. 30.

expiring at the end of a year, the reason for the requirement being to insure that the tenant who is cultivating the land should have a sufficiently long notice before being turned out of his holding. Under the agreement here in question the lessors might sell the premises very shortly before April 6 and turn the tenant out on very short notice.

The case of *Great Northern Ry. Co. v. Arnold* (1) has no bearing upon the present case.

Hollis Walker K.C. in reply. The case of *Doe v. Browne* (2) is distinguishable, for there the agreement provided that for an indefinite time the tenancy should not be determinable by the landlord at all, whereas here the tenancy is determinable by either party to it by the ordinary notice to quit. The passages cited on behalf of the defendant from *Bac. Abr.*, tit. "Leases," *Shep. Touch.*, and other of the older authorities are not in point because they do not relate to tenancies from year to year, but to tenancies for terms of years. According to the argument for the defendant, it would be impossible ever to create a tenancy from year to year, because it must always be uncertain how long such a tenancy will continue.

SALTER J. The plaintiffs are the owners of a farm in Lincolnshire of which the defendant is their tenant. Down to the time when the defendant's tenancy began the farm had been in the occupation of a Mr. Twigg on a tenancy from year to year determinable by the usual six months' notice to quit. By the agreement between the plaintiffs and the defendant, which is dated February 17, 1915, the latter agrees "to become tenant of the farm . . . now occupied by Mr. Twigg from the 6th day of April next at the same rent and upon the same terms as he is now tenant until the 6th day of April, 1916, or such later date being the 6th day of April immediately following the sale of the farm." The farm was in fact sold by the plaintiffs in August, September and October, 1919.

The question is whether or not in these circumstances

(1) 33 Times L. R. 114.

(2) 8 East, 165.

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the defendant's tenancy terminated on April 6 next following the sale, namely, April 6, 1920.

It is necessary in the first place to ascertain the true construction of the agreement between the plaintiffs and the defendant, which provides that the defendant is to become tenant upon the same terms as Twigg, and adds a further term as to the duration of the tenancy. That agreement provides in effect that the defendant shall from April 6, 1915, become tenant of the farm on a tenancy from year to year determinable on either side by the usual six months' notice to quit, until April 6, 1916, or such later date being April 6 immediately following the sale of the farm by the plaintiffs. The result of these provisions was that the tenancy would continue until it was determined in one or other of three ways—namely, first, by six months' notice to quit expiring on April 6 given by the landlord; secondly, by six months' notice to quit expiring on April 6 given by the tenant; or, thirdly, by the sale of the premises by the landlord and the subsequent lapse of the time till the next April 6. The last mentioned of these three ways of determining the tenancy clearly rests in the discretion of the landlord alone. The agreement is thus one under which the tenant can determine the tenancy in one way only—namely, by giving the usual six months' notice to quit, while the landlord can determine it in either of two ways—namely, either by giving the usual six months' notice to quit, or by selling the property at any time however near to the next April 6. The result is that while the landlord can always require and certainly rely upon six months' notice of the termination of the tenancy, the tenant cannot rely upon a notice of that length, but may be turned out on very short notice and otherwise than by the usual notice to quit.

The point is whether or not the provision in the agreement for the determination of the tenancy in consequence of the sale of the farm by the lessors is repugnant to the nature of a tenancy from year to year, and ought to be disregarded, and the tenancy treated as simply a tenancy from year to year on the usual terms determinable only by six

months' notice to quit by either party expiring at the end of a year. I do not think that much assistance is to be derived from the passages that have been cited from the older authorities as to the effect of want of certainty in the creation of a tenancy for a fixed term of years. We are dealing here not with a tenancy for a term of years, but with a tenancy from year to year, which is essentially uncertain in duration. It bears less resemblance to a tenancy for a fixed term of years than to a tenancy for a term determinable on the happening of an uncertain event. Nor has the case of *Great Northern Ry. Co. v. Arnold* (1) to which I have been referred very much bearing upon the present case. The only case which seems to me to be of much service here is *Doe v. Browne*. (2) In that case there was an agreement to lease at a certain rent, and that the lessor should not turn out the tenant so long as he paid the rent and did not sell any articles injurious to the lessor's business. Thus in that case the agreement purported to create a tenancy from year to year determinable by the tenant in the usual way, but it contained a provision that the tenancy was not to be determinable at all by the landlord for an indefinite time—namely, so long as the tenant complied with the conditions of the tenancy. The Court there held that as this was a provision which deprived the landlord of all right to determine the tenancy it was inconsistent with and repugnant to the nature of a tenancy from year to year and must be disregarded, and that the tenancy must be considered to be a tenancy from year to year determinable in the usual way by either party. I do not think that the present case falls within the principle of that case. I know of nothing which prevents parties, in entering into an agreement for a tenancy from year to year, from stipulating that it should be determinable by a notice to quit shorter than the usual six months' notice; or that the notices to quit to be given by the landlord and the tenant respectively should be of unequal length; or that the tenancy should be determinable by the one party only by notice to

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quit and by the other party either by notice to quit or in some other way. The agreement in question is an agreement for a tenancy from year to year, commencing on April 6 in a certain year, which provides that the tenancy can be determined by either party giving to the other the usual six months' notice to determine it at the end of a year, or on any subsequent April 6 immediately following the sale of the farm by the lessors. It is an agreement for a yearly tenancy, which, as already stated, stipulates that while the tenant can determine the tenancy in only one way—namely, by giving the usual six months' notice—the lessors may terminate it in either of two ways—namely, either by the usual notice, or by sale of the farm which may give the tenant a much shorter notice. I cannot find that there is in this agreement anything which is repugnant to or inconsistent with a tenancy from year to year, or anything ambiguous.

I therefore think that according to the terms of the agreement the tenancy expired on April 6, 1920, and that the plaintiffs are entitled to possession of the farm.

Judgment for plaintiffs.

Solicitor for plaintiffs: *Edward Downes, for Allisons & Staniland, Louth, Lincolnshire.*

Solicitor for defendant: *Richard Brooks, for S. B. Carnley, Alford, Lincolnshire.*

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[1919. O. 815.]

Gaming—Cheques given for racing Bets—Banker being Agent for Collection—“Holder”—Firm of Bookmakers—Registration as “accountants”—Default in furnishing Particulars of general Nature of Business—Gaming Act, 1835 (5 & 6 Will. 4, c. 41), s. 2—Gaming Act, 1892 (55 & 56 Vict. c. 9)—Registration of Business Names Act, 1916 (6 & 7 Geo. 5, c. 58), s. 3, sub-s. 1 (b), s. 8, sub-s. 1.

By s. 1 of the Gaming Act, 1835, notes, bills, and mortgages, which were by certain Acts of Parliament declared to be void, including notes, bills, and mortgages given as security for money lost in bets on horse races, are to be deemed to be made, drawn, accepted, given, or executed for an illegal consideration.

By s. 2: “In case any persons shall . . . make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is” (by the aforesaid Acts of Parliament) “declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law. . . .”

By s. 3, sub-s. 1, of the Registration of Business Names Act, 1916, every firm required under the Act to be registered shall furnish to the Registrar a statement in writing containing the following particulars: “(b) the general nature of the business.”

By s. 8, sub-s. 1: “Where any firm or person by this Act required to furnish a statement of particulars . . . shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise. . . .”

The plaintiffs, a firm of bookmakers, made an application for registration under the Registration of Business Names Act, 1916. In their application they included in their statement of particulars required by the Act a description of the general nature of their business as “accountants.” In this action they claimed from the defendant 997*l.* 17*s.* 11*d.*, the amount, with interest, of five cheques drawn by him upon his bank payable to the plaintiffs and delivered by him to them in payment of bets which he had lost to them and which had been dishonoured on presentation, and a further sum of 13*l.* 18*s.* 10*d.*, the amount

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of a cheque paid by the plaintiffs to the defendant for bets won by him from them and duly paid by the plaintiffs' bankers on presentation by the defendant's bankers to them. The plaintiffs claimed to be entitled to recover the 13*l.* 18*s.* 10*d.* under s. 2 of the Gaming Act, 1835, as money received by the defendant to the use of the plaintiffs:—

Held, upon the authority of Fletcher Moulton L.J. in *Hyams v. Stuart King* [1908] 2 K. B. 696, 718, that the plaintiffs being “an association for the purpose of carrying on a betting business” the action would not lie. As to the 13*l.* 18*s.* 10*d.*, the plaintiffs' claim was bad upon the further ground that it came within the exception mentioned by the Lords Justices in *Dey v. Mayo* [1920] 2 K. B. 346, of a payment made to the defendant's bank, which was to the plaintiffs' knowledge a mere agent of the defendant to collect the money.

Held, further, that the plaintiffs' description of their business as “accountants” was not sufficient to satisfy s. 3, sub-s. 1 (b), of the Registration of Business Names Act, 1916.

Semble, that the plaintiffs had not made “default” within the meaning of s. 8, sub-s. 1, of the Act, inasmuch as “default” in the sub-section means not furnishing a statement of particulars at all, as distinguished from furnishing insufficient particulars.

ACTION tried before Darling J.

The plaintiffs were a firm of bookmakers. In 1917 they made an application for registration under the Registration of Business Names Act, 1916. In their application they included in their statement of particulars required by the Act a description of the general nature of their business as “accountants.” In this action they claimed from the defendant Ralston 99*l.* 17*s.* 11*d.*, the amount, with interest, of five cheques drawn by him in June, 1919, upon his bankers, the British Linen Bank, Threadneedle Street, E.C., payable to the plaintiffs and sent by him to them in payment of bets which he had lost to them in May and June, 1919, and which had been dishonoured on presentation.

The plaintiffs also claimed a further sum of 13*l.* 18*s.* 10*d.*, the amount of a cheque drawn by them in May, 1919, upon their bankers, the London County Westminster and Parrs Bank, Ltd., crossed “& Co.,” payable to the defendant or order, sent by the plaintiffs to the defendant in payment of bets won by him from them. The cheque was indorsed by him in blank and paid by him into his account kept by him in his own name at his bankers mentioned above, and was duly paid by the plaintiffs' bankers on presentation by the defendant's bankers

to them. The plaintiffs averred that the defendant had and received the 13*l.* 18*s.* 10*d.* to the plaintiffs' use and/or that the plaintiffs paid the said sum for and on account of the defendant and that the plaintiffs were entitled to recover it by virtue of s. 2 of the Gaming Act, 1835.

As to all the sums claimed by the plaintiffs, the defendant alleged (*inter alia*) that the plaintiff firm was an association of four persons for the purpose of carrying on a betting business and nothing else, and that by reason of the Gaming Act, 1892, the action was unsustainable; and, further, that the sums claimed could not be recovered by the plaintiffs upon the ground that they had not complied with the provisions of the Registration of Business Names Act, 1916. As a further defence to the plaintiffs' claim for the 13*l.* 18*s.* 10*d.*, he denied the plaintiffs' averment that they were entitled to recover it by virtue of the Gaming Act, 1835.

Evidence was called in support of the plaintiffs' case but failed to prove a fresh agreement so as to enable the plaintiffs to recover the 997*l.* 17*s.* 11*d.* by virtue of the doctrine established by *Hyams v. Stuart King*. (1) It was admitted by the plaintiffs that the cheques for 997*l.* 17*s.* 11*d.* having been given by the defendant for lost bets and therefore for an illegal consideration, the plaintiffs could not recover the 997*l.* 17*s.* 11*d.* from the defendant upon the cheques.

Hollis Walker K.C. and *H. S. Simmons* for the plaintiffs.

Barrington-Ward K.C. and *E. Bowen Rowlands* for the defendant. The only claim of the plaintiffs which remains is that for the sum of 13*l.* 18*s.* 10*d.* which they seek to recover by virtue of s. 2 of the Gaming Act, 1835, as money paid for and on account of the defendant. They cannot recover it upon that ground, as the present case is within the exception mentioned by the Lords Justices in *Dey v. Mayo* (2) of a payment made to the defendant's bank which was to the plaintiffs' knowledge a mere agent of the defendant to collect the money. In the present case the defendant's banking account was in his own name. In *Dey v. Mayo* (2) the account

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was in the name of the defendant's wife, and the Court of Appeal held that as the plaintiff (the appellant) could not know anything of the position of the defendant's bankers the bankers were holders of the cheques within the meaning of s. 2 of the Gaming Act, 1835, and the appellant was entitled to succeed. In *Dey v. Mayo* (1) Bankes L.J. pointed out (2) that "A person who to the knowledge of the person making the payment is a mere representative or agent of the person to whom the . . . bill . . . was originally given to collect the amount thereof, cannot . . . be regarded for the purpose of the section in any other light than as the person himself." The plaintiffs and their bankers who paid the cheque for 13*l.* 18*s.* 10*d.* must be presumed to have known as a matter of business that the defendant's bankers were merely his agents to collect the money. In these circumstances they, by making the payment, abandoned their right to the money. They are now estopped from reclaiming it.

An action will not lie at the suit of the plaintiffs because they are an association of persons for the purpose of carrying on a betting business and nothing else. In *Hyams v. Stuart King* (3) Fletcher Moulton L.J. said that the defendants in that case being "an association for the purpose of carrying on a betting business" the action brought against them would not lie as "no such partnership is possible under English law." There is no express decision upon the point, but the proposition laid down by Fletcher Moulton L.J. goes to show that an association of that kind is not in law a partnership at all. In *Thwaites v. Coulthwaite* (4) Chitty J. held that an account could be ordered between partners in a betting business but there is nothing in his judgment which is inconsistent with the proposition of Fletcher Moulton L.J. in *Hyams v. Stuart King*. (3) In giving judgment in *Hyams v. Stuart King* (5) Farwell L.J. referred to *Thwaites v. Coulthwaite* (4) and said that he was not prepared to overrule the decision of Chitty J. in that case.

(1) [1920] 2 K. B. 346.

(2) *Ibid.* 356.

(3) [1908] 2 K. B. 696, 718.

(4) [1896] 1 Ch. 496.

(5) [1908] 2 K. B. 696, 725.

The description of the plaintiffs' business as "accountants" in their particulars under the Registration of Business Names Act, 1916, of the general nature of their business was not a sufficient compliance with s. 3, sub-s. 1 (*d*), of the Act and constituted "default" within the meaning of s. 8, sub-s. 1. Therefore any rights the plaintiffs may have arising out of any contract made by them in relation to the business carried on by them are not enforceable by action. The description is misleading. It ought to have been "commission agents" or "turf accountants." The word "default" in s. 8 of the Act of 1916 means failure to comply substantially with the provisions of the Act.

[Sects. 6 and 7 of the Registration of Business Names Act, 1916, were also referred to.]

Hollis Walker K.C. in reply. The word "default" in s. 8 of the Registration of Business Names Act, 1916, does not mean merely an inaccurate statement or mistake or omission. Sect. 7 shows that "default" means default in registering at all. False statements are dealt with by s. 9. It is therefore clear that "default" and false statements are entirely different things dealt with by separate sections.

As to the 13*l.* 18*s.* 10*d.*, s. 8 of the Act of 1916 only makes rights arising under any contract in relation to the business carried on by the defaulter unenforceable by action. But the plaintiffs are not suing on a contract, they claim under s. 2 of the Gaming Act, 1835. *Dey v. Mayo* (1) is in the plaintiffs' favour. It is true that in that case the defendant's banking account was in the name of his wife, but it was held by Avory J. (2) and the Court of Appeal (3) that the wife was merely the defendant's agent and that the account in her name was the husband's account. *Dey v. Mayo* (1) is therefore indistinguishable from the present case.

Fletcher Moulton L.J. was the dissenting Lord Justice in *Hyams v. Stuart King* (4) and therefore the proposition laid down by him as to a firm of bookmakers not being able to sue cannot be considered a binding authority.

(1) [1920] 2 K. B. 346.

(2) [1919] 2 K. B. 622, 623, 624.

(3) [1920] 2 K. B. 351, 359.

(4) [1908] 2 K. B. 696.

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[*Daniel v. Rogers* (1) and *Whiteman v. Sadler* (2) were also referred to.]

DARLING J. having stated the facts continued: It was recognized by counsel for the plaintiffs that, upon the evidence, the present case is not within the decision in *Hyams v. Stuart King* (3), and it is not contended that the 997*l.* 17*s.* 11*d.* can be recovered by means of an action on the cheques. It is therefore clear that as to the 997*l.* 17*s.* 11*d.* the plaintiffs' claim cannot succeed.

But the plaintiffs also seek to recover the sum of 13*l.* 18*s.* 10*d.* they paid the defendant. They allege that under s. 2 of the Gaming Act, 1835, they are entitled to recover that sum as money paid for and on account of the defendant.

In answer to this claim the defendant alleges, first, that the plaintiffs cannot recover because they have made default in furnishing the statement of the particulars of the general nature of their business required by s. 3, sub-s. 1, of the Registration of Business Names Act, 1916, and are therefore debarred from recovering by s. 8, sub-s. 1, of the Act. The section provides that if they make default in furnishing the statement of particulars, the rights arising out of any contract they make in relation to their business shall not be enforceable by action. In registering their firm under the Act the plaintiffs, under s. 3, sub-s. 1 (b), furnished particulars of the general nature of their business which they described as "accountants." I do not think that was a sufficient description to satisfy the section. It is misleading for a bookmaker to call himself an accountant. Bookmakers often call themselves "turf accountants," and it may be that the expression "turf accountants" is a synonym for "bookmakers," and might pass as sufficient description of a firm of bookmakers. But without the addition of the word "turf" the expression "accountants" is not sufficient. An accountant is a person who is paid for investigating accounts and certifying as to their accuracy.

As to whether the plaintiffs by describing themselves as

(1) [1918] 2 K. B. 228. (2) [1910] A. C. 514, 521. (3) [1908] 2 K. B. 696.

accountants made "default" in furnishing a statement of particulars within the meaning of s. 8, sub-s. 1, of the Registration of Business Names Act, 1916. I incline to think that the word "default" in the sub-section means not furnishing any particulars at all, and does not mean furnishing insufficient particulars. But I do not decide the point, because I base my decision in the present case upon another ground.

It was also contended on behalf of the defendant that the plaintiffs' claim to recover the 13*l.* 18*s.* 10*d.* was bad, because the circumstances in the present case were distinguishable from those in *Dey v. Mayo* (1) and the defendant's bankers were not holders within s. 2 of the Gaming Act, 1835, as interpreted by the rule laid down in that case. In *Dey v. Mayo* (1) the cheques were paid into an account kept in the name of the defendant's wife and it was held that the plaintiff was entitled to succeed under s. 2 of the Gaming Act, 1835. I do not think the decision in *Dey v. Mayo* (1) extends to the present case where the defendant's banking account was kept in his own name, and I think that the construction placed on *Dey v. Mayo* (1) by the arguments on behalf of the defendant in the present case is the true construction and that *Dey v. Mayo* (1) is not an authority which enables the plaintiffs to recover the 13*l.* 18*s.* 10*d.*

It was also contended on behalf of the defendant that the action was wholly unsustainable on the ground that the plaintiffs are an association of four persons for the purpose of carrying on a betting business and nothing else, and that a betting business is not of such a character that persons can enter into a partnership so as to be able to maintain an action. No authority was cited in support of this proposition except the words used by Fletcher Moulton L.J. in giving judgment in *Hyams v. Stuart King*. (2) He said: "In the first place, I am of opinion that the action is wholly unsustainable as having been brought against a firm in the firm's name and in accordance with the procedure provided for such cases." The present action is brought not against, but by, a firm carrying on a betting business, and if the language

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(1) [1920] 2 K. B. 346.

(2) [1908] 2 K. B. 696, 718.

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of Fletcher Moulton L.J. is to be followed as authoritative, the present case is an a fortiori one, and neither the firm nor a partner can be allowed to set up a case in which the proceeds of the action would be apportionable between the partners. Fletcher Moulton L.J. continued: "The so-called firm was an association for the purpose of carrying on a betting business and nothing else." So is the plaintiff firm in the present case. Fletcher Moulton L.J. added (1): "This was admitted at the trial and is evident from the so-called deed of partnership which was put in, and the cheque which was in the name of the partnership was for bets, so that all parties knew that betting was a partnership purpose. In my opinion no such partnership is possible under English law." If Fletcher Moulton L.J. was right in saying that no such partnership is possible under English law, by no machinery, whether under the Registration of Business Names Act, 1916, or otherwise, can persons be allowed to bring an action in the name of the firm. In my judgment Fletcher Moulton L.J. correctly laid down the law in the passages in his judgment in *Hyams v. Stuart King* (1) which I have quoted, and as the plaintiff firm is an association for the purpose merely of carrying on a betting business, and as the money they claim is sued for as the proceeds of transactions in the betting business, the action will not lie. Persons associating in such a business as this cannot come into a Court of law and claim that money is due to the firm on a transaction of this kind. The inclination of the law is not to favour but to discourage betting. True, it does so in a partial, confused and illogical fashion, but the law upon this point is correctly stated by Fletcher Moulton L.J. in *Hyams v. Stuart King* (1) and therefore the action cannot be maintained either for the 997l. 17s. 11d. or the 13l. 18s. 10d.

Judgment for defendant.

Solicitor for plaintiffs: *J. J. Hands.*

Solicitors for defendant: *Smith, Rundell, Dods & Bockett.*

(1) [1908] 2 K. B. 696, 718.

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[IN THE COURT OF APPEAL.]

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HARDY v. CENTRAL LONDON RAILWAY COMPANY.

[1919. H. 1094.]

Negligence—Railway Company—Moving Staircase unprotected—Children playing thereon—Children warned off and driven away—Trespassers.

A railway company had at one of their stations in London a moving staircase which led from the booking hall to the underground platforms next the lines. The staircase was open to the street in the sense that there was no physical obstruction to prevent any one in the booking hall walking on to the staircase. There was a ticket collector stationed at a barrier at the bottom of the staircase. Children from the neighbourhood were in the habit of frequently, especially in the evening, playing upon the staircase by running down it and up again, but they were always warned off both by the ticket collector at the bottom and by the clerk in the booking office. A railway policeman, whose duties took him into the booking hall twice an hour, always drove the children away when he saw them there. On the evening of the accident hereinafter mentioned the policeman drove the children away, but when he was gone they returned, and with them was the plaintiff, a boy of five and a half years of age, in charge of an older boy. The latter before going into the booking hall looked round to see if the policeman had gone away. The older boy played on the staircase, leaving the plaintiff in the booking hall. In the booking hall the rubber band, which worked the staircase round a wheel, was open to sight and touch by anyone in the booking hall. The plaintiff placed his hand in such a position that it was caught by the moving band and seriously injured. The plaintiff claimed damages, on the ground that the defendants were negligent in that they took no precaution to prevent children from playing in the booking hall and on and with the staircase, and permitted the plaintiff to be in the booking hall, and did not guard or watch the staircase or wheel and moving balustrade :—

Held, that the plaintiff was, in the circumstances, a trespasser, and that the defendants were not liable.

APPEAL from the judgment of Shearman J. at the trial of the action without a jury.

The plaintiff was at the date of the accident hereinafter mentioned a boy aged five and a half years who sued by his father as his next friend, and the action was brought to recover damages for personal injuries owing to the alleged negligence of the defendants.

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The defendants had at their Liverpool Street station a mechanical moving staircase or escalator for the use of passengers, leading from the booking hall to the underground platforms next the lines. The staircase was worked by an endless band, which consisted of different segments joined together by studs. At the top the band passed round a wheel, by which it was pulled round, and where it left the wheel and followed the guidance of a brass plate leading to the head of the staircase it was open to sight and touch by persons in the booking hall. At the time of the accident it was not fenced off or protected at this point. The booking hall was open to the street, and the staircase was open at the top, so that there was no physical obstruction preventing any one in the booking hall from using it. There was a female ticket-collector at a barrier at the bottom of the staircase, and there was a female booking clerk behind a window in the booking hall. It was a common practice for children to play upon the staircase, generally in the evening, by running down as far as they could without being caught by the ticket collector at the bottom and running up again. The children were always warned off the staircase by the booking clerk or the ticket collector, and a railway policeman, whose duty took him into the booking hall twice every hour, always drove the children away. The children went away when told to do so. (1)

On April 9, 1919, in the evening, a number of children, who were playing on the staircase, were driven away by the policeman and chased as far as the other side of the street. When however the policeman's duties took him away, the children returned, among them being the plaintiff who was in charge of an older boy named Nichols. Before going into the station Nichols looked round to see if the policeman was there, and not seeing him went down the staircase. The plaintiff was left in the booking hall, as he was too young to go on the staircase. The plaintiff was soon afterwards heard to scream, and his hand was found to be caught in the band

(1) The evidence of the children is set out in the judgment of Scrutton L.J.

at the place where it left the wheel and passed along the brass plate, and was so severely injured that it had to be amputated.

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The statement of claim alleged that the booking hall was a place of habitual resort for children who frequently played upon the top part of the escalator ; that the defendants were negligent in that they took no precaution to prevent children from playing in the booking hall and upon and with the escalator, and permitted the plaintiff to be and remain in the booking hall, and suffered the escalator to be and remain unattended, and took no steps to insure that it was properly watched and safeguarded, and further did not guard or adequately or properly guard the governing wheel and moving balustrade.

The defendants in their defence denied that they were guilty of negligence, and pleaded that the plaintiff was at the time of the accident a trespasser on their premises.

Shearman J. said that he was unable to distinguish the facts and the law in this case from the facts and the law in *Cooke v. Midland Great Western Ry.* (1) The defendants knew that children were in the habit of frequenting the station, and he came to the conclusion that the plaintiff was there with the licence of the defendants, because they did not take the simple, easy and effective steps which would have prevented the children from coming on to their property ; that the moving staircase was an allurement or attraction to children ; and that the defendants were negligent in not protecting the machinery at the place where the accident happened, and were therefore liable. He awarded the plaintiff 300*l.* damages.

The defendants appealed.

Compston K.C. and *R. O. Roberts* for the defendants. The plaintiff was a trespasser in the booking hall and not a licensee. The children had continually been warned off the premises, and both the plaintiff and the boy Nichols, in whose charge the plaintiff was, knew that they ought not to be there. Before entering the premises Nichols looked to see if the

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policeman was there, and only entered because of the policeman's absence. The defendants did all they reasonably could do to warn off trespassers. *Cooke v. Midland Great Western Ry.* (1) is not in point. There the House of Lords considered that the plaintiff was a licensee. This appears clear from the speeches of Lord Macnaghten (2) and of Lord Atkinson (3), and from the statement by Lord Collins (4) that the place was frequented "largely by young people without remonstrance by the defendants," and that "a jury might well infer not merely a licence, but an invitation." In *Latham v. Johnson* (5) Farwell and Hamilton L.JJ. considered that *Cooke's Case* (1) was decided on that ground. In *Lowery v. Walker* (6) Buckley L.J. and the House of Lords held that the plaintiff was on the land with the permission of the owner, and was not a trespasser; and in *Jenkins v. Great Western Ry. Co.* (7) the defendants were held not to be liable, because they had not given leave or licence to the infant plaintiff to be at the place where he was injured. The plaintiff here being a trespasser the defendants are not liable, there being no dangerous trap or instrument placed there intentionally with intent to injure trespassers.

[*Earl v. Lubbock* (8) and *Norman v. Great Western Ry. Co.* (9) were also cited.]

Hawke K.C. and *Croom-Johnson* for the plaintiff. The Court will not interfere with the findings of the learned judge if there is any evidence to support them. The evidence shows that the children used constantly to play upon the moving staircase, and though occasionally warned off or driven away by the police constable they always returned, and stayed a considerable time. The warnings were quite ineffective. There was therefore no effective objection on the part of the defendants. There was the same kind of ineffective warning both in *Cooke v. Midland Great Western Ry.* (1), as is apparent

(1) [1909] A. C. 229.

(2) Ibid. 236.

(3) Ibid. 238, 239.

(4) Ibid. 241.

(5) [1913] 1 K. B. 398, 408, 416-420.

(6) [1910] 1 K. B. 173, 189; [1911] A. C. 10.

(7) [1912] 1 K. B. 525.

(8) [1905] 1 K. B. 253.

(9) [1915] 1 K. B. 584, 591.

from the report of the case in the Court below (1), and also in *Lowery v. Walker*. (2) The learned judge was therefore entitled to find that there was no serious objection by the defendants to the children playing in the booking hall and on the moving staircase. On that finding the plaintiff was not a mere trespasser, though he had no right to be there. In the American case of *Keffe v. Milwaukee Ry. Co.* (3), like *Cooke's Case* (4), there was the attraction or allurements of a turntable, and also in *Barrett v. Southern Pacific Co.* (5) In *Latham v. Johnson* (6), as appears from the argument, there was no allurements to children, otherwise the judgment would have been different. In the present case there was the allurements of the moving staircase, unprotected, the children having access to it, and there was no sufficient warning. The defendants might have protected the staircase by putting the barrier at the top instead of at the bottom. The plaintiff was therefore not a mere trespasser, but was in the position of a licensee. It is a matter of degree, and there is no reason to disturb the finding of the learned judge. [*Lynch v. Nurdin* (7); *Singleton v. Eastern Counties Ry. Co.* (8); and *Ponting v. Noakes* (9) were also cited.]

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Compston K.C. in reply.

Cur. adv. vult.

July 26. BANKES L.J. read the following judgment :—This is an appeal from the judgment of Shearman J. awarding damages to an infant who was very seriously injured while in the defendant company's booking hall at Liverpool Street station. There is in the booking hall a mechanical moving staircase or escalator. The infant placed his hand in such a position that it was caught by the strap which worked the staircase, and it was so severely crushed that it had to be amputated. The exact position of the escalator in reference to the street was not gone into at the trial. The learned judge mentions the fact in his judgment that it was within a

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| (1) [1908] 2 I. R. 242. | (5) [1891] 25 Am. St. Rep. 186. |
| (2) [1910] 1 K. B. 173. | (6) [1913] 1 K. B. 401, 402. |
| (3) (1875) 18 Am. Rep. 393. | (7) (1841) 1 Q. B. 29. |
| (4) [1909] A. C. 229. | (8) (1859) 7 C. B. (N. S.) 287. |
| (9) [1894] 2 Q. B. 281, 285, 286. | |

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few yards of the open street, but I do not understand that any attempt was made to establish that the escalator was a nuisance so as to bring the case within the authority of *Lynch v. Nurdin* (1) and *Harrold v. Watney* (2), and that class of cases. The case for the plaintiff as set out in the statement of claim was that the booking hall was a place of habitual resort for children who frequently played upon the escalator, and that the negligence of the defendants consisted in taking no precautions to prevent children from playing in the booking hall and upon and with the escalator, and in permitting the plaintiff to be and remain in the booking hall, and in suffering the escalator to remain unattended, and in taking no steps to insure that the same was properly watched and safeguarded, and in not guarding or adequately or properly guarding the governing wheel and moving balustrade. There appears not to have been any real conflict of evidence in reference to the extent to which children were in the habit of playing on the escalator, or as to the efforts of the railway company's servants to prevent their doing so. Shearman J. has found that the plaintiff was where he was, when he was injured, "with the licence of the company, because they did not take the simple, easy, and effective steps which would have prevented the children coming into the property." If this finding is warranted by the evidence I think that the plaintiff would be entitled to the damages which the learned judge awarded him, upon the ground that there was evidence upon which the learned judge might treat that portion of the escalator in which the plaintiff's hand was caught as something so highly dangerous in itself to children licensees as to constitute a trap against which it was the duty of the railway company to provide adequate protection: see per Hamilton L.J. in *Latham v. Johnson*. (3)

The serious and important question in the present case is whether the learned judge was justified in holding that the infant plaintiff was in the position of a licensee. That depends entirely upon the evidence, as to which, as I have said, there

(1) 1 Q. B. 29.

(2) [1898] 2 Q. B. 320.

(3) [1913] 1 K. B. 419, 420.

was no real conflict. The evidence established clearly that numbers of children had been for a long time in the habit of playing upon the escalator whenever they got the opportunity, and generally in the evening. The evidence established equally clearly that the railway company's employees warned the children off whenever they saw them. The employees particularly referred to were a female ticket collector who was stationed at the bottom of the escalator, a female booking clerk in the booking office, and a railway policeman whose duties took him into the booking hall about once every half-hour. The warnings off given by these persons were ineffective in this sense only, that they did not prevent the children returning as soon as they thought that the policeman was safely out of the way, or the ticket collector or booking clerk so occupied as to be unable to do anything except warn them off again. The evidence seems to show that the children always went away when told to do so. If this is the true view of the evidence, the finding of the learned judge appears to me to lay a wider duty upon the owner or occupier of premises towards children frequenting those premises than the law has hitherto recognized. That law has been so fully and elaborately discussed comparatively recently in this Court by Farwell and Hamilton L.JJ. in *Latham v. Johnson* (1) that it is not necessary to look beyond those judgments to ascertain what the law is. Farwell L.J. says (2) that he is not aware of any case that imposes any greater liability on the owner towards children than towards adults. This is no doubt true, but in accepting the proposition the fact must not be lost sight of that a very different inference may have to be drawn from facts when dealing with the case of an infant, than when dealing with the case of an adult. For instance, what may amount to an effective warning to an adult may be no warning at all to an infant. What may amount to an invitation or a licence to a child may be neither the one nor the other to an adult. The present appears to be a case in which, though the warnings off were ineffective in the sense I have indicated, they were entirely effective in bringing home

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(1) *Ibid.* 398.(2) *Ibid.* 407.

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to the minds and intelligences of the children concerned that they had no business to be where they were, or to play on the escalator, and that whenever they were seen they would be warned off. I can conceive of warnings to children so ineffective, either from their nature or from the absence of any attempt to enforce them, as to convey to the mind of a child the impression that no real objection was taken to what was being done. In such a case it might be possible to draw the inference that the child was allowed to be and remain under the impression that it had permission to do what it was doing ; or to use the language of Gibbs C.J. in *Deane v. Clayton* (1), and Vaughan Williams and Kennedy L.JJ. in *Lowery v. Walker* (2), it was encouraged to come by the absence of objection. The same kind of inference was drawn in *Lowery v. Walker* in the House of Lords (3), where Lord Halsbury speaks of persons crossing the occupier's ground in one sense with his permission, not that he has given direct permission, but that he has declined to interfere and so acquiesced in their crossing it. The present case is not one in which, in my opinion, any inference of licence can be drawn. I come to the conclusion upon the evidence that the children were all of them fully aware of the fact that they had no right to be, and no business to be, where they were. In other words that they were trespassers. In *Latham v. Johnson* (4) Hamilton L.J. deals with this point in these words : " Here it is hard to see how infantile temptations can give rights, however much they may excuse peccadilloes. A child will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so." In the present case the elder boy, in whose charge the infant plaintiff was, appears to me to have been fully aware that he was a trespasser in the booking hall. The plaintiff was probably old enough to be aware of the fact also, seeing that it was the policeman who drove the children away on several occasions. However that may be, I do not think that the plaintiff is entitled to be put into a better position than the

(1) (1817) 7 Taunt. 489, 533.

(2) [1910] 1 K. B. 185, 198.

(3) [1911] A. C. 14.

(4) [1913] 1 K. B. 415.

boy in whose charge he was at the time of the accident. If the plaintiff was a trespasser then he has no right of action, as there is no evidence of any allurement with malicious intent to injure: see *Latham v. Johnson* (1), per Farwell L.J.; and per Lord Robson in *Grand Trunk Ry. Co. v. Barnett*. (2)

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One naturally feels great sympathy for a child who has been injured as the infant plaintiff has, but to recognize a right of action in respect of his injuries would be, I think, to acknowledge the existence of a rule of law which, if carried to its furthest length, would measure the degree of protection to which a child is entitled by the extent to which it disregarded warnings, until at last persistent disobedience and neglect to obey warnings would entitle a child to protective fencing round every object within the limits of its wanderings which might attract its youthful fancy and could cause it injury.

The decision in *Cooke v. Midland Great Western Ry.* (3) in the House of Lords clearly proceeded upon the inference that the children resorted to the turntable with the tacit permission of the railway company. The headnote of the case is misleading in using the expression trespassers. The notice board was obviously treated as not conveying any impression to the children's minds. For the reasons I have given I do not think that any inference can be drawn in the present case except that the children were, and knew that they were, trespassers. The appeal must be allowed, and the judgment for the plaintiff set aside, and judgment entered for the appellants with costs here and below.

WARRINGTON L.J. read the following judgment:—The question in this case is whether the defendants are liable in damages for the result of an accident whereby the plaintiff, a little boy of five and a half years old, sustained a serious injury.

The action was tried before Shearman J. without a jury, and he found for the plaintiff, awarding him 300*l.* damages.

(1) [1913] 1 K. B. 405. (2) [1911] A. C. 361, 369.
(3) [1909] A. C. 229.

C. A. The defendants appeal. The plaintiff's claim is founded on
1920 the alleged neglect of the defendants duly to perform a duty
towards the plaintiff which it is said they owed him, and the
HARDY v. main question is whether they owed any and if so what duty
CENTRAL towards the plaintiff under the circumstances of the present
LONDON case, and whether they neglected to perform such duty.
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Warrington L.J. At the Liverpool Street station of the defendants there is a moving staircase starting in the booking office, itself open to the street. On the floor of the booking office is an erection about $2\frac{1}{2}$ feet high, containing some machinery connected with the staircase, and in particular a horizontal wheel round which passes an indiarubber band constituting the handrail of the staircase. This band moves with the staircase, and just where it leaves the wheel and follows the guidance of a brass plate leading to the head of the staircase it is open to sight and touch on the part of persons in the booking office. At the time of the accident the erection and the band at the point I have mentioned were not fenced off or guarded in any way. As to the staircase itself, it was entirely open at the top, that is, there was no physical obstruction against the use of it by any one in the booking office. There was a ticket collector posted at a barrier at the bottom, and there was a booking clerk behind a window in the office who seems to have done something in the way of warning unauthorized people away from the staircase, but as she was not able to leave her office her interference was not very effectual. There were other officials of the company whose duties took them there from time to time, and there was a policeman employed by the defendants, one of his duties being to prevent the unauthorized use of the staircase. His visits were, however, intermittent only. There are some working men's dwellings in the neighbourhood with many children living there. It has been a common practice with some of those children to use the staircase as a playground by running down as far as they dare without being caught by the ticket collector and then running up again, and so on. They have often been warned off, and the policeman has driven them away, but with the barrier at the bottom, the clerk shut up in the office, and the

other officials and the policeman only on the spot at intervals, the attempts to prevent the children from playing on the staircase have not been effectual, and the practice continued.

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On the evening in question, at a comparatively quiet time so far as legitimate traffic was concerned, the usual game had been played by a party of children until they were driven away by the policeman, who chased them as far as the other side of the street. When, however, his duties took him away the children came back, and among them there were now the plaintiff and an older boy in whose charge the plaintiff was supposed to be. Whether they were among those who had been driven away is not quite clear ; I rather think they were, but it seems to me unnecessary to find one way or the other, for it is quite clear that the elder boy, and I have no doubt the plaintiff himself, knew they were doing what was forbidden, for the boy says that before going into the station with the plaintiff he looked round to see if the policeman was there, and only went in because he satisfied himself that he was not. The plaintiff was considered by his fellows to be too young to take part in the game on the staircase, but his appointed guardian did so, leaving him on the floor on which stood the small erection I have mentioned. What then happened can only be inferred from what followed ; the boy was heard to scream, and was found caught by his hand in a part of the machinery, with the result that before he could be rescued his hand was practically torn off. I think it must be inferred that, impelled by curiosity or by some childish motive, he put his hand on the band with the result described above.

Under these circumstances the liability of the defendants depends in the first instance on the answer to be given to the question, Was the plaintiff on the occasion in question a mere trespasser at the place where he met with the accident, or was he there by the licence or invitation, express or tacit, of the defendants ? It has been contended, and Shearman J. has held, that his position was that of licensee, if not of invitee. If that conclusion is correct it may be that it was the duty of the defendants to protect the plaintiff from a temptation so potent to a child of moving machinery and the danger almost

C. A. certainly resulting from interference with it: see per
 1920 Hamilton L.J. in *Latham v. Johnson*. (1) But I think the
 plaintiff was not a licensee or invitee, but a mere trespasser.
 HARDY I think on the evidence that the defendants cannot be said
 v. to have permitted children to resort to the booking office as
 CENTRAL a playground or for any purpose not connected with the
 LONDON use of their railway; and further I think it was proved,
 RAILWAY particularly by the evidence of Harry Nichols, the boy in
 COMPANY. whose care the plaintiff was, that it was brought home to the
 Warrington L.J. children that in frequenting the booking office they were doing
 what was forbidden. Not only were they aware that their
 practice of so frequenting the station was forbidden by the
 defendants, but it is made clear to my mind from the statement
 of Nichols, noted by counsel but not mentioned by the judge,
 that he looked round for the policeman, that on this particular
 occasion they deliberately did what they knew they were
 forbidden to do. Much stress was laid in argument on the
 "allurement" afforded by the moving staircase. Such a
 fact may be a material element in considering whether under
 all the circumstances leave and licence is to be inferred, but
 where, as I think is the case here, leave and licence is distinctly
 negatived, the fact ceases to be relevant. In the case of a
 trespasser, to quote the words of Hamilton L.J. in *Latham v.*
Johnson (2): "The owner of the property is under a duty not
 to injure the trespasser wilfully; 'not to do a wilful act in
 reckless disregard of ordinary humanity towards him'; but
 otherwise a man 'trespasses at his own risk.'" It cannot
 be said in the present case that the defendants violated their
 duty towards the plaintiff as there expressed, and, in my
 opinion, once the conclusion is arrived at that the plaintiff
 was a trespasser, the judgment of the Court ought to be in
 the defendants' favour.

Much stress was rightly laid on the decision of the House of
 Lords in *Cooke v. Midland Great Western Ry.* (3) but I think it
 is quite clear that that decision proceeded on the footing
 that the plaintiff was a licensee, if not an invitee: see per

(1) [1913] 1 K. B. 416.

(2) [1913] 1 K. B. 411.

(3) [1909] A. C. 229.

Lord Collins (1), in which case the duty of the owner is higher than in the case of a trespasser. It may then be his duty, if there exists on the land some "allurement," the yielding to which may be a source of danger, to take some steps to counteract the attraction or to minimize the danger. The decision in *Cooke v. Midland Great Western Ry.* (2) is carefully and exhaustively explained by Hamilton L.J. in *Latham v. Johnson* (3), and it would be presumptuous in me to attempt to add anything to what he has said. *Lynch v. Nurdin* (4), again, was a different case. There the children were lawfully on the highway. The defendant's servant had negligently left on the highway an unattended horse and cart, which, to use the language of Vaughan Williams L.J. in *Harrold v. Watney* (5) in reference to another subject-matter, "constituted a danger to those using the highway—that is, it constituted a nuisance"; and in such a case the wrongful act of the children in meddling with it did not neutralize the effect of the initial negligence of the defendant.

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On the whole then, while I feel sincere sympathy for the child and his parents, I cannot give effect to it. In my opinion the appeal should be allowed, and judgment entered for the defendants.

SCRUTTON L.J. read the following judgment:—A little boy named Hardy, under six years of age, was touching or playing with the band of the moving staircase at a Central London tube station, when his hand in some way got caught in the mechanism and was torn off. He sued the railway company for damages, basing his claim on the negligence of the company in failing to keep him off the moving staircase or to guard it properly. Shearman J., conceiving himself bound, as other judges have done before him, by the decision of the House of Lords in *Cooke's Case* (2), gave judgment for the plaintiff. The company appeals.

The first question is as to the legal position of the plaintiff

(1) [1909] A. C. 241.

(3) [1913] 1 K. B. 418.

(2) [1909] A. C. 229.

(4) 1 Q. B. 29.

(5) [1898] 2 Q. B. 320, 324.

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in the company's station. He was not a passenger by train, but was brought with or came with other children who played on the top half of the moving staircase, whenever they were not stopped from so playing. The company's policeman turned them off whenever he saw them, but he was not always in that part of the station. As one of the boys said, according to a note taken by plaintiff's counsel, "He had told me not to play on the stairs, but not on that evening. I looked round that day to see if the policeman was there; he wasn't, so I went on the stairs. . . . The lady in the booking office upstairs told me to run away." Another boy said: "Twice I was told to go away, a man downstairs told me to go back. The policeman had told me three times to go away. My mother told me not to go again." A girl now in an industrial school said: "One night a policeman told us to go away. We went away. Then we came back again. . . . Mother told me not to go again." The ticket collector at the bottom of the stairs often went after them. The policeman had always warned off children and had done so that evening. The lady in the booking office called out from her window, but did not leave the office. The evidence was confused as to whether the little boy was in charge of any one. The boy Nichols, who went because the policeman wasn't there, said: "Johnny always went with me." The boy Miller said: "Nichols kept Johnny off for fear he might be hurt, he is too small to go on." The girl said she was with Johnny, he was standing still.

On this evidence the judge has found that "the child was there with the licence of the company." I am unable to take that view. The evidence seems clear that, whenever servants of the company saw the children, they either drove them away or told them to go away, and that the children waited till the policeman had gone to another part of the station. The judge has apparently found the children licensees, because, there being an object attractive to children on the company's premises, the company have not taken every step they could to keep trespassing children off, such as putting barriers at the top of the stairs. This seems to me a very dangerous

proposition for landowners. Many of them have objects attractive to children on their land: apple trees, streams, and other infantile joys. Must they, besides warning off the children whenever they see them, erect such fences or walls that no child can get through? No one can walk London streets without seeing that children delight to cling on to omnibuses and trams when the collector is inside collecting fares, though he turns them off as soon as he returns. Are they there by licence of the company? Kennedy L.J. in *Lowery v. Walker* (1) distinguishes between absence of objection under circumstances implying intentional encouragement and merely tacit acquiescence short of such permission. This case seems even further off leave and licence; there is constant active objection, but failure to keep some one always there to stop children who are doing what you have repeatedly told them not to do and stopped them from doing. I cannot understand a use of language which describes such persons as there by my leave and licence, because I do not go to the expense and trouble of always stopping them from infringing my rights, though I very frequently do so. In my opinion, the plaintiff was a trespasser, and I do not think till comparatively recently anyone could have any doubt about it. In *Lowery's Case* (2) the House of Lords found themselves justified from evidence of long continued use of a short cut, with no effective prevention by the landowner, in finding a position equivalent to licensees. In *Cooke's Case* (3) again the House of Lords found the company had given leave to the children to be on the turntable. I do not think I should have found that fact in either case; but neither finding compels me to find a licence in this case, where, in my opinion, there are no facts to support it.

If the children were trespassers, the landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his

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(1) [1910] 1 K. B. 198.

(2) [1911] A. C. 10.

(3) [1909] A. C. 229.

C. A. business. Against those he was under no obligation to guard
1920 trespassers.

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I would add that if the child was a licensee he was, in my opinion, a bare licensee. I have endeavoured to state the law as to such persons in *Hayward v. Drury Lane Theatre* (1), and do not restate it here; but on the measure of liability there laid down, which rests on the great authority of Willes J. in *Gautret v. Egerton* (2) I cannot see that the company would even on this assumption be liable.

The learned judge below followed *Cooke v. Midland Great Western Ry.* (3) as I did in *Latham v. Johnson.* (4) I entirely agree with the criticisms and limitations which Farwell L.J. and Hamilton L.J. in *Latham v. Johnson* (5) made on *Cooke's Case* (3), and explained as it is there explained it does not in my opinion govern this case.

In my opinion the appeal should be allowed with costs here and below.

Appeal allowed.

Solicitors for plaintiff: *Ransom & Williams.*

Solicitors for defendants: *Ashurst, Morris, Crisp & Co.*

(1) [1917] 2 K. B. 899, 913, 914.

(3) [1909] A. C. 229.

(2) (1867) L. R. 2 C. P. 371.

(4) [1913] 1 K. B. 398.

(5) *Ibid.* 408, 417 et seq.

W. F. B.

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[1919. H. 1067.]

Sale of Goods—Delivery—Time—Essence of Contract—Waiver—Estoppel—Implied Agreement to extend Time—Reasonable Time to be fixed by Notice from Buyer—Cancellation by Buyer without Notice—Damages—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 4, 10; s. 11, sub-s. 1; s. 61.

Under a contract for the sale of goods to be delivered within a certain period of time the buyer's right to require delivery within that period may be waived even after that period has expired; but it would seem that, where the contract is within s. 4 of the Sale of Goods Act, 1893, the waiver must be evidenced by writing.

Where, after the expiration of the period of delivery fixed by a contract for the sale of goods, the buyer by his letters and conduct leads the seller to entertain the belief that the contract still subsists and to act upon that belief at serious expense to himself, a new agreement may be implied that the period for delivery is extended and that delivery may take place within a reasonable time of which notice is to be given by the buyer to the seller.

By a contract coming within s. 4 of the Sale of Goods Act, 1893, and duly made in writing, the plaintiff agreed to sell to the defendant 11,000 lb. of cotton yarn, delivery to begin in September, 1918, and to be at the rate of 1100 lb. per week, failure to deliver within the stipulated time to render the contract liable to cancellation by the defendant, and incomplete deliveries not to be taken into account. Delivery should have been completed by November 15, 1918. The plaintiff delivered no yarn till October 26, 1918, when he delivered 550 lb., and thereafter on various dates from the end of November, 1918, to the end of February, 1919, he delivered seven further quantities averaging upward of 500 lb. each. During all this period and the early part of March, 1919, the defendant by his letters complained of the delay and asked for better deliveries, but thereby led the plaintiff to entertain the belief that the contract still subsisted, and to act upon that belief at expense to himself. On March 13, 1919, the defendant, having given no previous notice requiring delivery in any reasonable time, wrote to the plaintiff cancelling the order, and he thereupon refused to take any further quantity of the yarn. The plaintiff brought an action against the defendant for damages for refusing to take the remainder of the yarn:—

Held, that, although time was of the essence of the contract with respect to delivery which should, *prima facie*, have been completed by November 15, 1918, yet the defendant by his letters, though written after that date, had waived his right to insist that the period for delivery terminated on that date; that the defendant was also thereby estopped from alleging that that period terminated on that date; that the letters between the parties implied a new agreement that delivery might be

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made within an extended and reasonable period, of which notice was to be given by the defendant to the plaintiff, and as the defendant had given no such notice, no period had been fixed within which the plaintiff should make delivery; and that in these circumstances the defendant had no right to cancel on March 13, 1919, and the plaintiff was entitled to damages to be assessed as at that date.

Plevins v. Downing (1876) 1 C. P. D. 220; *Bentsen v. Taylor, Sons & Co.* [1893] 2 Q. B. 274; and *Panoutsos v. Raymond Hadley Corporation* [1917] 2 K. B. 473 considered and principles applied.

Leather-Cloth Co. v. Hieronimus (1875) L. R. 10 Q. B. 140 commented upon.

ACTION tried by McCardie J. without a jury.

The plaintiff, Noble Hartley, was a cotton yarn merchant carrying on business at Manchester, and the defendant, Stanley William Hymans, was a yarn merchant carrying on business at Bradford in Yorkshire.

The following statement of the facts of the case is taken substantially from the judgment of McCardie J. :—

By a contract contained in a written memorandum (M 1113) signed by the defendant and dated July 29, 1918, he agreed to purchase from the plaintiff 11,000 lb. of cotton yarn of two sizes—namely, 2/82 and 2/88. It was a term of the bargain that delivery should be at the rate of 1100 lb. per week starting in September. Amongst the conditions at the back of the memorandum were the following :—

1. "The goods are to be delivered free to our works or depots as specified, in good order and condition and exactly in accordance with our specification (if any). Quantities must not exceed those specified."

8. "Failure to deliver the goods within the stipulated time, and in accordance with the above conditions, renders this order liable to cancellation by us, and you will be held responsible for any loss of profit incurred by us through your default."

9. "Incomplete deliveries not taken to account."

It was agreed between the parties that the date at which the plaintiff should have completed his deliveries under the contract was November 15, 1918.

No delivery at all was made by the plaintiff till October 26, 1918, when he supplied 550 lb. Meanwhile the defendant

had made vigorous protests against the plaintiff's delay. From October 26, 1918, the defendant again urged delivery and on November 19, 1918, the plaintiff supplied, and the defendant accepted, another 550 lb. Further deliveries were made by the plaintiff and accepted by the defendant under the contract as follows :—

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	lb.		lb.
November 29, 1918	550	February 5, 1919	550
December 9, 1918	550	February 7, 1919	484
December 12, 1918	550	February 27, 1919	660
December 16, 1918	363		

Over the whole of this period the defendant by his letters constantly urged the plaintiff to deliver; he complained of the delay, and he referred to the absolute necessity of having better deliveries.

The defendant apparently treated the contract as being still alive. Thus, on December 3, 1918, his letter to the plaintiff referred to the cotton yarn "which you have on order for me." So on January 4, 1919, he wrote: "I trust you will make me a very substantial delivery during the early part of next week." On January 20 he wrote: "My clients are extremely annoyed at this dilatoriness on your part, and are threatening to cancel unless I complete the order within the next 2 or 3 weeks. You have had ample warning and the fault will be entirely yours if my clients cancel. I should think that in your interest, seeing that the market has dropped so considerably, you would have made a special effort to get in high priced orders. I have warned you before of the risk you are taking and the entire responsibility will be yours if I have to cancel."

The defendant had resold to one of his customers the yarn purchased by him from the plaintiff.

On February 1 he wrote: "I thank you for your invoice for 500 lb. (2/82), and shall be glad if you will push a further 1500 lb. with all possible speed, and also 1100 lb. of the 2/88. My customer is desperately in need of this yarn and I trust you will make no mistake about getting delivery at once."

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On February 7 the plaintiff delivered a further 484 lb. On February 21 the defendant wrote : " Regarding my order for 2/82 and 2/88 I regret that I have not been favoured with your report on this contract as promised by your representative on Tuesday last. As I then informed him I cannot see my way to accept responsibility now, owing to the dilatory methods which you have adopted in executing this contract, should my customer cancel the same."

On February 27 the plaintiff delivered a further 660 lb.

On March 1 the defendant wrote a letter in which he said : " With reference to my order for 2/82 and 2/88 I shall be glad if you will kindly observe the following instructions which have just been posted to-day by my client." He then gave precise instructions as to the marking of the goods to be delivered by the plaintiff under the contract of July 29, 1918, and added : " I trust that you will pay particular attention to these instructions . . . as I before stated I shall not under any circumstances now accept any responsibility as to what course of action my customer takes with regard to this contract."

On March 4, 1919, he wrote : " If owing to your late delivery my client cancels on me I shall have no option but to cancel on you." On March 8 he wrote : " I shall be glad if you will kindly let me have a delivery as soon as possible against contract."

On March 10 he wrote : " Further to my letter of March 8, please mark outside the packages (bundles) the following quality marks ' J. C.' and oblige."

To this letter the plaintiff replied on March 11 : " Your letters of the 8th and 10th inst. duly to hand and I note that you require the mark ' J. C.' putting outside the package, and I have given instructions for this to be done. I am glad to be able to send you herewith invoice for 660 lb. of 2/82, and I am pushing the mill as much as I possibly can for further deliveries."

The defendant's answer was as follows, dated March 13, 1919 : " With reference to my order M 1113 this was given to you for delivery 100 bundles per week starting the first

week in September. You did not start delivery until October, and you have been consistently late in deliveries ever since as per the various letters I have written you. Owing to your late deliveries I much regret to state that I must cancel this order, and I cannot take to account the 660 lb. that Messrs. Delany & Co. advised me this morning you had delivered to them. I regret that it should be necessary for me to cancel this order but the fault has been entirely your own." This letter constituted the repudiation relied on by the plaintiff.

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To the letter of March 13 the plaintiff replied: "I am in receipt of your favour of the 13th inst. and in reply the yarn is all in work and cannot be stopped. The order will be completed now in a very short time. I cannot agree to accept your attempt of cancellation, the yarn is ready and it will be invoiced to you and delivered to Delany. I trust that you will take such deliveries duly to account in order to avoid the necessity of any unpleasantness."

This ended the material correspondence.

The defendant wholly refused to accept the 660 lb. mentioned in the preceding letter or to take any further deliveries from the plaintiff.

The defendant had duly paid the contract prices for the deliveries accepted by him from October 26, 1918, to February 27, 1919.

Some additional facts or findings of fact are stated below in the earlier part of the judgment of the learned judge.

On May 13, 1919, the plaintiff brought the present action against the defendant claiming damages for the alleged refusal of the defendant to accept delivery of the balance of the goods.

The plaintiff in his statement of claim alleged in effect (para. 2) that by the contract the plaintiff sold to the defendant the said parcel of 11,000 lb. of cotton yarn, delivery to commence in September, 1918, at the rate of 100 bundles of 11 lb. each per week; (para. 3) that under the contract the plaintiff had delivered yarn and the defendant had accepted and paid for it at various dates in and

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between October, 1918, and March, 1919; (para. 4) that the defendant agreed to extend the time for delivery verbally by his agents on various dates between September, 1918, and March, 1919, and also in letters written by the defendant to the plaintiff, and in particular letters dated October 5 and 6, and November 4, 1918, and January 2 and 14, and February 1, and March 1, 8 and 10, 1919; (para. 6) that on March 13, 1919, during the continuance of the contract by letter of that date the defendant wrongfully cancelled the contract and declined to accept or pay for any more yarn under it, although the plaintiff was, at all material times, ready and willing to deliver the same, and that he suffered damage thereby and claimed damages.

The defendant, in his defence, stated in effect (para. 4) that, if he entered into any contract with the plaintiff, it was for the sale and purchase by the plaintiff and the defendant respectively of the said parcel of yarn on the following, amongst other terms—namely, (a) that delivery should commence in September, 1918, and should be at the rate of 100 bundles of 11 lb. each per week, and (b) that failure to deliver within the stipulated time should render the contract liable to cancellation by the defendant; that the contract was contained in a memorandum dated July 29, 1918; and that the plaintiff having received the memorandum and ascertained its terms proceeded to deliver to the defendant by instalments, goods thereby ordered, and by so acting accepted, or asserted to the defendant that he had accepted, these terms; (para. 5) that the defendant denied that the delivery, acceptance and payments in para. 3 of the statement of claim referred to were under or had reference to the alleged or any contract other than that in para. 4 of the defence referred to; and that save as aforesaid para. 3 of the statement of claim was admitted; (para. 6) that the defendant denied that he or any agent of his agreed to extend the time for delivery as in para. 4 of the statement of claim alleged or at all, or that his agents had authority so to agree; (para. 7) that the defendant admitted that on March 13, 1919, he cancelled the contract, if any, between the parties, and that

he declined to accept or pay for any further yarn, but he denied that the plaintiff was at the alleged or any material time ready or willing to deliver the same or that he had suffered the alleged or any damage; that on or before March 13, 1919, the defendant had in breach of the contract, if any, between the parties failed and refused to make deliveries in accordance with the terms thereof and the defendant was accordingly entitled to treat the contract as being at an end, or alternatively to cancel it; and that particulars of the plaintiff's said failure and refusal would be found in the letters from the defendant to the plaintiff of various dates there specified on and between September 25, 1918, and March 8, 1919; and (para. 8) that save in so far as in the defence expressly admitted all the allegations in the statement of claim were denied.

The action was tried on June 9 and 10, 1920.

Cyril Atkinson K.C. and *H. Derbyshire* for the plaintiff.

Langdon K.C. and *Alexander Cairns* for the defendant.

The arguments on both sides and the authorities cited in support of them fully appear from the judgment.

June 30. McCARDIE J. read the following judgment:—
This action raises a point of much interest and constant recurrence with respect to contracts for the sale of goods. [His Lordship stated the facts substantially as above set out, observing (inter alia) that it seemed to be absolutely clear from the defendant's letters that he had treated the contract as being alive after the expiration of the contract period for delivery of the goods, and continued :] I am satisfied that the failure of the plaintiff to deliver was not due to any neglect on his part. It arose through the difficulties of the times which affected both his sub-contractors and himself, and it was due to no small extent to the existence and operations of the Cotton Control Board. The yarn in question was being spun for the plaintiff by one firm and it was being "doubled" for him by another firm. It was of a special description and was suitable for the continental market only

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as distinguished from the English market. At the date of the defendant's cancellation on March 13 the whole of the yarn required for the contract had been spun and practically the whole of it had been "doubled." Those are the substantial processes, and the remaining work to make the goods ready for delivery could have been promptly carried out. The plaintiff could, within a reasonable time from March 13, have supplied to the defendant the whole undelivered balance. He was ready and willing to do so. The defendant's customer never did cancel his contract with the defendant. At the time of the defendant's cancellation of the contract the market had fallen heavily and the defendant's repudiation has caused substantial loss to the plaintiff. The damages are agreed at 563/.

Upon the above facts and letters (which are characteristic of many sales of goods cases) there arise the important questions of law which were argued before me with great ability by counsel on both sides.

The plaintiff submits (in substance) that the defendant treated the contract as subsisting after the expiration of the stipulated period for delivery, and that he was therefore bound to give a reasonable notice before terminating the bargain.

The defendant submits (in substance) that after the expiration of the contract period he was completely justified in law in terminating the contract at any time and without the slightest notice to the plaintiff.

It is common ground and indeed it is obvious that the defendant here terminated the contract in the most abrupt manner and without any notice at all, save the letter of March 13, 1919. That letter fixed no time within which the plaintiff was required to deliver. On the contrary it decisively refused to take delivery of the goods which were almost ready for delivery and upon the manufacture of which the plaintiff had taken special steps involving heavy expense at the defendant's request long after the expiry of the contract period.

It may well have been thought that the law upon the

matter had long been ascertained and clearly settled inasmuch as the point is vital and of unceasing recurrence. But counsel could not cite nor have I been able to find a single direct reported authority on the question, and two days of acute argument occurred before me in discussing several lines of ambiguous or complex decisions and in seeking to formulate some guiding and definite principle. Questions of waiver were argued in conjunction with s. 4 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and questions as to a new agreement were analyzed in conjunction with the conduct of the defendant and his alleged obligation to give a reasonable notice ere cancelling. Here, of course, the contract fell within s. 4 of the Sale of Goods Act, 1893. The whole legal position is, in my view, most unsatisfactory and confusing. I have felt the greatest difficulty in arriving at any opinion and I give this judgment with the utmost diffidence and doubt.

It is well to deal at once with one or two points on which the law applicable seems to be settled.

In the first place I think that time was here of the essence of the contract. This, indeed, was not really disputed by the plaintiff. It is curious that s. 10 of the Sale of Goods Act, 1893, deals so ambiguously with this point. That section provides: "(1.) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract." This section gives a very slender notion of the existing law, and it is well to remember s. 61 which provides (inter alia): "(2.) the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act . . . shall continue to apply to contracts for the sale of goods." Now the common law and the law merchant did not make the question whether time was of the essence depend on the terms of the contract, unless indeed those terms were express on the point. It looked rather to the nature of the contract and the character of the

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goods dealt with. In ordinary commercial contracts for the sale of goods the rule clearly is that time is *prima facie* of the essence with respect to delivery : see per Lord Cairns L.C. in *Bowes v. Shand* (1) (the sale of rice) ; per Cotton L.J. in *Reuter v. Sala* (2) (sale of pepper) ; and per Lord Esher M.R. in *Sharp v. Christmas* (3) (the sale of potatoes). In *Paton & Sons v. Payne & Co.* (4), however, it was held by the House of Lords that in a contract for the sale and delivery of a printing machine time was not of the essence. This point is not fully dealt with in *Benjamin on Sale*, 5th ed., pp. 588 et seq., and no general rule appears to be stated in that treatise. But in *Blackburn on Sale*, 3rd ed., pp. 244 et seq., the matter is more clearly treated and it is laid down that " In mercantile contracts, stipulations as to time (except as regards time of payment) are usually of the essence of the contract." I may add that the relevant decisions on the point are excellently summarized in *Halsbury's Laws of England*, vol. xxv., p. 152, in the section on Sale of Goods written by Sir Mackenzie Chalmers and Mr. W. C. A. Ker. With the above text-books may be contrasted the passage in *Addison on Contracts*, 11th ed., p. 543.

Now, if time for delivery be of the essence of the contract, as in the present case, it follows that a vendor who has failed to deliver within the stipulated period cannot *prima facie* call upon the buyer to accept delivery after that period has expired. He has himself failed to fulfil the bargain and the buyer can plead the seller's default and assert that he was not ready and willing to carry out his contract. That this is so seems clear. It is, I take it, the essential juristic result when time is of the essence of the contract. This is cogently shown by the judgment in *Plevins v. Downing* (5) where the plaintiff vendors agreed to deliver iron in the month of July ; as Brett J. put it (6) when delivering the opinion of the Court : " The day after the end of July they could not have insisted

(1) (1877) 2 App. Cas. 455, 463,
464.

(2) (1879) 4 C. P. D. 239, 249.

(3) (1892) 8 Times L. R. 687.

(4) (1897) 35 S. L. R. 112.

(5) 1 C. P. D. 220.

(6) *Ibid.* 226.

on an acceptance of iron then offered to the defendant " (1) : see also per Martin B. in *Coddington v. Paleologo* (2) ; and upon an analogous point see *Pearl Mill Co. v. Ivy Tannery Co.* (3)

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Hence Mr. Langdon contends in the present case that upon the expiry of the contract period on November 15, 1918, the plaintiff ceased to possess a right to tender under the contract, that the defendant then ceased to be under a duty to take delivery, and that the subsequent letters of the defendant and his acceptance of postponed deliveries did not place him under any contractual obligation to the plaintiff. He submits that whatever the defendant's conduct, and in spite of his letters, he could at any time reject delivery even though tendered at his express demand.

Mr. Atkinson argues on the other hand that the defendant must by reason of the above matters be taken to have waived the right to insist that time was of the essence of the contract, and he alternatively submits that upon the correspondence I should find that a new agreement was made between the parties. He further submits that upon the proper effect of such new agreement the defendant could terminate his obligation to take the undelivered balance only by giving a notice to the plaintiff fixing a reasonable time for completion of the bargain.

Discussion on the above points involved a citation of many decisions bearing more or less directly on waiver, extension of time, new agreement and the like, and those decisions certainly illustrate the difficulties of the position.

I cannot help feeling that much of the difficulty has arisen by the omission to keep clear the distinction between cases which are within the Statute of Frauds or s. 4 of the Sale of Goods Act, 1893, and cases which are not within those statutory provisions. If this distinction be borne in mind then the cases where the waiver or extension of time is evidenced by writing may fall into one class, and the cases where the waiver or extension of time is not so evidenced

(1) 1 C. P. D. 226.

(2) (1867) L. R. 2 Ex. 193, 196, 197.

(3) [1919] 1 K. B. 78, 83.

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fall into another class. In the present case, it is to be noted, the plaintiff relies on the defendant's letters, and he pleads those letters in the statement of claim as evidence of and as constituting an agreement for an extension of time for delivery, or a waiver of the contract time.

Now in considering the present case it is well to bear in mind s. 11, sub-s. 1 (a), of the Sale of Goods Act, 1893, which provides: "Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated." This provision seems to apply as much to conditions as to time as to other conditions: see, for example, *Alexander v. Gardner* (1) and Halsbury's Laws of England, vol. xxv., p. 153. In *Alexander v. Gardner* (1) the plaintiff agreed to sell the defendant butter to be shipped in October. The butter was not, in fact, shipped till November, but the defendant waived the objection and accepted the invoice and bill of lading. It was held that he was liable for the price, although the butter was lost by shipwreck. Tindal C.J. said: "If the party waives the condition he is in the same situation as if it had never existed." It is to be noted that although in that case the waiver was not by writing but by conduct only it yet was held effective. The rule as to waiver is stated broadly in Blackburn on Sale, 3rd ed., pp. 212, 213, as follows: "Where there is a condition precedent to the duty of either party to do some act, it is a good defence to an action for not doing that act to say that the condition precedent has not happened or been performed. But that defence is no longer available if the party wishing to set it up has waived his right to insist upon the performance of it, as, for example, where, after the time when the condition ought to have been performed, he accepts any benefit under the contract." See also p. 523 of the same treatise. With equal breadth is the matter stated in Benjamin on Sale, 5th ed., p. 563: "The necessity for performing the condition precedent may be waived by the

(1) (1835) 1 Bing. N. C. 671, 677.

party in whose favour it is stipulated, either expressly or tacitly, by inference from his acts or conduct, as, for example, where he leads the other party to suppose that the contract is still binding, and that the breach of the condition will be treated only as a breach of a warranty." It might well be presumed from the above passages that waiver can be effected in contracts for the sale of goods either by writing or by word of mouth or by conduct and equally whether the contract be within or without s. 4 of the Sale of Goods Act, 1893, or the Statute of Frauds. But the extent to which the rule has been cut down will appear later in this judgment.

Now, if the present be a case of waiver I should hold that the defendant had undoubtedly waived the condition that the goods should be delivered by November 15, inasmuch as long after that date he demanded and received deliveries under the contract. But Mr. Langdon argued that a distinction existed between cases where a contract period was continuing and cases where the contract period had wholly expired. In the former case he submitted that waiver could take place provided that s. 4 of the Sale of Goods Act, 1893, was complied with, but in the latter it could not take place at all unless the defendant had actually received the goods and even though the waiver was evidenced by writing. I confess that I cannot myself understand why a man may not waive a condition after expiry of the contract period. But a view favourable to Mr. Langdon's contention seems to have been taken by Bray J. in *Corn Products Co. v. Fry* (1), where, although the parties seem to have treated the contract as subsisting after the contract period, yet Bray J. said : " In the absence of a new binding agreement, no arrangement made after the time for performance by the defendants had expired would be binding," and the learned judge cited *Plevins v. Downing* (2) in support of his proposition. With the view of Bray J. may be contrasted the words of Bailhache J. in *Dudley, Clarke & Hall v. Cooper, Ewing & Co.* (3) which is unreported but of which a shorthand note has been supplied to me. He said : " When

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(1) [1917] W. N. 224.
(2) 1 C. P. D. 220.

(3) July 9, 10, 11, 14, 1919.
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there is a contract for the delivery of goods in a specified time, if the goods are not delivered within that time there is a breach of contract by the seller who contracts to deliver within the specified time unless he has some exception in his contract which excuses him. But it is commonly the case that parties do not hold each other strictly to contractual times, and when it is found that the parties are not holding each other strictly to the contractual time but are extending the time or treating the contract as still on foot, the contract remains on foot so far as time is concerned notwithstanding that the contractual time has expired." Both of the above cases, *Corn Products Co. v. Fry* (1) and *Dudley, Clarke & Hall v. Cooper, Ewing & Co.* (2), were, of course, cases within s. 4 of the Sale of Goods Act, 1893. In the passage cited from Bailhache J. in the latter case, that learned judge did not refer to any need for a new agreement, or to s. 4 of the Sale of Goods Act, 1893, nor did he point to any possible distinction between an extension of time before the expiration of a contract period and an extension of time after the expiration of such period.

Now before I venture to state my view of the decisions I may usefully quote the following passage from Addison on Contracts, 11th ed., p. 544: "In the case of contracts required by s. 4 of the Sale of Goods Act, 1893, to be in writing, it often appears that the time specified for delivery or acceptance of the goods or payment of the price is enlarged by one party at the verbal request of the other. The promise to deliver or pay at the substituted time cannot be sued on, and it appears that the original agreement is no longer the agreement between the parties. The difficulty on this point, which has been the subject of consideration in many cases, has now been set at rest, and the plaintiff must rely on the original agreement or nothing. If he can aver and prove that he was ready and willing to perform his part of it, and that the defendant made default on his part, the plaintiff proves a cause of action. Thus, where the time for delivery is

(1) [1917] W. N. 224.

(2) July 9, 10, 11, 14. Unreported.

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extended at the request of the defendant, the plaintiff can prove that he was ready and willing to deliver at the time mentioned in the written agreement. But if the time were extended at the plaintiff's own request, he cannot sue on the original contract, since he was not ready and willing to perform his part; nor can he sue on the substituted agreement, because the term on which he insists is not in writing." In connection with this passage a number of decisions are cited ranging from *Cuff v. Penn* (1) to *Plevins v. Downing*. (2) I do not pause to analyze this passage or to point out the difficulties it suggests, particularly by the words "it appears that the original agreement is no longer the agreement between the parties." I myself conceive that upon the expiration of a contract period the contract does not ipso facto become void. On the contrary it clearly remains alive—e.g., for the purpose of an action by the party not in default. I imagine that all that is meant by Addison is that the party who is in default cannot sue on the original contract which he was not ready and willing to perform unless he can prove either a waiver by the other side or an agreement that the original contract should continue to subsist in spite of the expiration of the contract period.

Now *Plevins v. Downing* (2) seems to be the root decision of the matter and I desire to state my view as to the effect of that decision. There the basic facts were that the plaintiffs sold some iron for delivery in July, 1874, under a written contract. The value of the iron was over 10*l.* and the contract therefore was required to be evidenced by writing. They failed to deliver the iron in July and were therefore in default. In October, 1874, the defendant met the plaintiffs' manager and said: "You have not sent any [iron] pigs lately"; to which the plaintiffs' manager replied: "I will send you a boat [of them] this week." Thereupon the plaintiffs forwarded twenty-five tons which the defendant refused to accept. There the arrangements made after the contract period were purely verbal. The plaintiffs sued for damages for non-acceptance. They failed in the action (as I

(1) (1813) 1 M. & S. 21.

(2) 1 C. P. D. 220, 226.

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read the decision of Brett, Grove and Denman JJ.) for two reasons—namely, (1.) because they were unable to show that they were ready and willing to fulfil the original contract, and (2.) because the incident of October consisted of a verbal conversation only. In the judgment of the Court there is this passage: “Inasmuch as they [the plaintiffs] cannot rely upon their readiness and willingness to deliver according to the terms of the original contract, because they were not so ready and willing, they are logically driven to rely upon the subsequent request of the defendant, either as a proposed alteration of a term of the original contract, or as a request upon which to hang a new contract to accept. But, as the request was merely verbal, the undertaking sought to be founded on it cannot be enforced.” It will be observed that the Court did not hold that the request could not (apart from the Statute of Frauds) be a proposed alteration of a term of the original contract or that it could not be a footing on which to base a new contract to accept. The decision on this point rested on the ground that the request was verbal. Hence, I do not, with respect, follow wholly the observations of Bray J. already cited in *Corn Products Co. v. Fry* (1) as to the effect of *Plevins v. Downing*. (2) If the request in *Plevins v. Downing* (2) had been in writing then I conceive that, upon the circumstances of that case, a verdict for the plaintiff could have been supported and the more so if the written request had referred to the original written contract.

The effect of *Plevins v. Downing* (2) is stated in Benjamin on Sale, 5th ed., p. 689, as follows: “Held, that the plaintiffs could not sue on the original contract, inasmuch as they were unable to prove that they were ready and willing to deliver the 25 tons at the end of July, and had only withheld delivery at the defendant’s request, neither could they rely upon the request to deliver made to them by the defendant in October, as that would have constituted a new contract, which was by parol only.” *Plevins v. Downing* (2), however, seems to decide that a new and binding arrangement as to time of delivery cannot, where the Statute of Frauds applies,

(1) [1917] W. N. 224.

(2) 1 C. P. D. 220, 226.

be made by mere conduct or by word of mouth either before or after the contract period has expired. *Plevins v. Downing* (1) seems also to decide that a waiver of rights as to time of delivery cannot (where the contract is under the Statute of Frauds) be made by mere conduct or spoken words. The defendant in *Plevins v. Downing* (1) had in my view clearly waived by his words a right to insist on the plaintiffs' non-observance of the contract time, and I confess that, apart from the Statute of Frauds, I do not see why he should not have been held to that waiver having regard to the facts of the case. This, I imagine, is consonant with the decision in *Goss v. Lord Nugent* (2), a case with respect to land and therefore within s. 4 of the Statute of Frauds. There the defendant verbally stated that he would accept the title of the plaintiff to certain lands notwithstanding a defect therein. It was held that he was not bound by such statement, inasmuch as it was not in writing. Thus a waiver whether by word of mouth or by conduct cannot apparently be binding if the original contract be within the statute. It is worth while to recall, when considering such decisions, that it suffices to satisfy the Statute of Frauds if the party charged has signed a proposal for an agreement which the other party has accepted verbally or by conduct: see *Reuss v. Picksley*. (3)

In the case of *Tyers v. Rosedale and Ferryhill Iron Co.* (4) the variation of the contract took place during and not after the contract period. There was no express contract for such variation, but the letters between the parties showed an acquiescence with respect to the postponement of deliveries: see per Cockburn C.J. (5) If such an acquiescence, when evidenced by writing, is effective during the contract period I am unable to see why it should not be effective after the expiration of the contract period, and I conceive that this was the substance of the opinion of Bailhache J.: *Dudley, Clarke & Hall v. Cooper, Ewing & Co.* (6) This view seems to

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(1) 1 C. P. D. 220.

(2) (1833) 5 B. & Ad. 58.

(3) (1866) L. R. 1 Ex. 342.

(4) (1875) L. R. 10 Ex. 195.

(5) Ibid. 198.

(6) Unreported.

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accord with *Bentsen v. Taylor, Sons & Co.* (1) (which was a charterparty case) in which the ship sailed a month later than the contract date. The defendants (the charterers) therefore had the right to repudiate. But instead of doing so they wrote certain letters and did certain things which I need not specify. Lord Esher M.R. said (2): "She [the ship] did not sail till nearly a month afterwards, and there was a breach of the condition. The defendants had then a right to treat the contract as at an end, or they could, if they chose, treat it as still subsisting. But, if they intended to treat the contract as at an end, it was their duty so to exercise their right as not to lead the plaintiff to believe that he was still bound by the contract." The test put by Bowen L.J. in that case was this (3): "Did the defendants by their acts or conduct lead the plaintiff reasonably to suppose that they did not intend to treat the contract for the future as at an end, on account of the failure to perform the condition precedent, but that they only intended to rely on the misdescription as a breach of warranty, treating the contract as still open for further performance?" The test seems to apply exactly to the present case apart from the question of s. 4 of the Sale of Goods Act, 1893. It may be said however that *Bentsen's Case* (1) was a case of charterparty and not of sale of goods. The answer to that criticism is that exactly the same principle was applied by the Court of Appeal in *Panoutsos v. Raymond Hadley Corporation* (4), which was in fact a sale of goods case. I do not state the facts in that well-known decision by the Court of Appeal consisting of Lord Reading C.J., Lord Cozens-Hardy M.R. and Scrutton L.J. Lord Reading C.J. cited with approval (5) the doctrine of Bowen L.J. in *Bentsen's Case* (6), and added: "I cannot find any authority to support the proposition that, when one party has led another to believe that he may continue in a certain course of conduct without any risk of the contract being cancelled, the first-mentioned party can cancel the contract without

(1) [1893] 2 Q. B. 274.

(2) Ibid. 279.

(3) Ibid. 283.

(4) [1917] 2 K. B. 473.

(5) Ibid. 478, 479.

(6) [1893] 2 Q. B. 274, 283.

giving any notice to the other so as to enable the latter to comply with the requirement of the contract. It seems to me to follow from the observations of Bowen L.J. in *Bentsen v. Taylor, Sons & Co.* (1) that there must be reasonable notice given to the buyer before the sellers can take advantage of the failure to provide a confirmed bankers' credit. That is the decision of Bailhache J." It is curious to observe that the waiver by the seller in *Panoutsos' Case* (2) (where, as I have said, the contract was within s. 4 of the Sale of Goods Act, 1893) was not by writing but by conduct only, and there seems to have been a binding variation of the contract obligation in favour of the buyers in spite of the absence of writing. The decision in that case may well be contrasted with the decisions already cited in this judgment. I desire to add that the principle stated in *Panoutsos' Case* (2) seems to be fully agreeable to the broad rule of justice stated by Lord Cairns L.C. and Lord O'Hagan in *Hughes v. Metropolitan Ry. Co.* (3) and by Farwell J. in *Bruner v. Moore.* (4) It is true, however, that in these two latter cases the Statute of Frauds did not arise, and hence I cite *Morrell v. Studd* (5), where s. 4 of that statute was in question and where, as Astbury J., after referring to *Hickman v. Haynes* (6) and *Goss v. Lord Nugent* (7), said: "They [those cases] merely decide that when a contract falling within the Statute of Frauds is once made, no conduct or verbal waiver can be relied upon to substitute a different term from one appearing in the contract itself." (8)

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How several of the cases and dicta I have cited are to be reconciled with *Leather-Cloth Co. v. Hieronimus* (9) I know not. There the written contract for the sale of goods provided that the goods were to be sent by the sellers to Ostend. They then changed the place of destination to Rotterdam. It was left by Archibald J. to the jury to say from the silence and subsequent conduct of the defendant whether or not

(1) [1893] 2 Q. B. 274, 283.

(2) [1917] 2 K. B. 473.

(3) (1877) 2 App. Cas. 439, 448,

449.

(4) [1904] 1 Ch. 305, 312, 313.

(5) [1913] 2 Ch. 648.

(6) (1875) L. R. 10 C. P. 598.

(7) 5 B. & Ad. 58.

(8) [1913] 2 Ch. 659.

(9) L. R. 10 Q. B. 140.

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there had been an assent by him to the change of route from Ostend to Rotterdam. The jury found that there was such assent and a verdict passed for the plaintiff. The Court of Queen's Bench (Cockburn C.J., Blackburn, Mellor and Archibald JJ.) upheld the verdict, and Blackburn J. said: "I cannot see why the assent to a substituted mode of performing one of the terms of a contract need be in writing and may not be by parol, though the original contract must have been in writing." (1) This was a clear case of waiver by conduct. I see that *Leather-Cloth Co. v. Hieronimus* (2) was not discussed by the House of Lords in *Morris v. Baron & Co.* (3)

I have, I fear, already cited a somewhat large number of decisions with respect to the operation of the Statute of Frauds and of s. 4 of the Sale of Goods Act, 1893.

In considering certain decisions it is desirable to separate clearly the points which arose therein with respect to the principle of *Ogle v. Earl Vane*. (4) That principle was closely interwoven with the observation of the Court in *Hickman v. Haynes* (5) and *Plevins v. Downing*. (6) It will suffice to say that that principle has no bearing on the present case and to discuss it would only involve a further confusion. The Statute of Frauds has already introduced sufficient difficulties into the application of the ordinary principles of contract law.

Now, upon this unhappy confusion of authority and this embarrassing ambiguity of principle, what are the conclusions at which I should arrive in the present case, where the contract was one within s. 4 of the Sale of Goods Act, 1893? In my view the facts and documents here clearly call for one or more juristic bases upon which to support the plaintiff's claim. I shall hold: (1.) That here the defendant waived his right to insist that the contract period terminated on November 15, 1918. The waiver is evidenced by writing, and I rule that it binds the defendant even though it took place after November 15.

(1) L. R. 10 Q. B. 146.

(2) Ibid. 140.

(3) [1918] A. C. 1.

(4) (1868) L. R. 3 Q. B. 272.

(5) (1875) L. R. 10 C. P. 598.

(6) 1 C. P. D. 220.

Waiver is not a cause of action, but a man may be debarred by the doctrine of waiver from asserting that an original condition precedent is still operative and binding. In view, moreover, of the fact that the plaintiff acted (at great expense to himself) upon the footing that the waiver had taken place, it would, I conceive, be wrong to allow the defendant to insist on the terms of the original contract as to time.

(2.) I hold that (in so far as estoppel differs from waiver) the defendant is estopped from saying that the period for delivery expired on November 15, 1918, or from asserting that the contract ceased to be valid on that date. Inasmuch as the defendant led the plaintiff to believe by letter, as well as conduct, that the contract was still subsisting, and inasmuch as the plaintiff acted on that belief at serious expense to himself, it would be unjust to allow the defendant to assert that the delivery period ended on November 15. I shall apply to this case the principle asserted by the Court of Appeal in *Bentsen's Case* (1) and approved by the Court of Appeal in *Panoutsos' Case*. (2)

(3.) I hold that upon the letters passing between the parties I can, and ought to, imply a new agreement that the contract period should be extended beyond November 15, 1918—i.e., until the defendant had given a notice to the plaintiff requiring delivery within a reasonable period. I here imply such agreement. In so holding I feel that I am acting not only in consonance with *Plevins v. Downing* (3), but also in accord with the already cited words of Bailhache J. in *Dudley, Clarke & Hall v. Cooper, Ewing & Co.* (4), and with the principle, of *Panoutsos' Case*. (2) I do not doubt that the defendant would have been entitled in March, 1919, to give a notice fixing a reasonable time within which the plaintiff was required to supply the undelivered balance of the contract goods. This point was also dealt with by Bailhache J. in *Dudley, Clarke & Hall v. Cooper, Ewing & Co.* (4) when he said: "It is quite open to a buyer to say when deliveries are late and he has been extending the time that he will not take

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(1) [1893] 2 Q. B. 274, 283.

(3) 1 C. P. D. 220.

(2) [1917] 2 K. B. 473.

(4) Unreported.

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further deliveries unless they are made within some reasonable time which he is entitled to designate." The principle is one which is further illustrated by the cases cited in Leake on Contracts, 6th ed., p. 617, and it accords with the ratio of the decision in *Jones v. Gibbons*. (1) The defendant here gave no such notice. He cancelled with peremptory abruptness. But for the fact that the defendant's repudiation was absolute as to all undelivered goods a difficult question would have arisen as to the proper period or periods for delivery which could have been fixed by the defendant in March, 1919. But, inasmuch as he absolutely refused on that date to take any further goods at any time, the point is covered by the decision of the Exchequer Chamber in *Tyers v. Rosedale and Ferryhill Iron Co.* (2) Hence it is right to assess the damages as at March, 1919. Those are agreed at 563*l*.

I therefore give judgment for the plaintiff for that amount with costs.

Judgment accordingly.

Solicitors for plaintiff : *Tatham & Lousada, for Farrar & Co., Manchester.*

Solicitors for defendants : *Speechly, Mumford & Craig, for Mumford, Johnson & Co., Bradford.*

(1) (1853) 8 Ex. 920.

(2) L. R. 10 Ex. 195.

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[1919. S. 3219.]

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25.

*Contract—Formation—Identity of contracting Party—Material Element—
Sale of Theatre Ticket—Procuring Breach of Contract—Servant of
contracting Party—Liability.*

The plaintiff desired to be present at the first performance of a play at a theatre. He knew that, in consequence of his having made certain serious and unfounded charges against some members of the theatre staff, an application for a ticket in his own name would be refused. He therefore obtained a ticket through the agency of a friend who bought the ticket at the theatre without disclosing that it was for the plaintiff. By order of the defendant, the managing director of the theatre, the plaintiff was refused admission to the theatre on the night in question. The plaintiff claimed damages from the defendant for maliciously procuring the proprietors of the theatre to break a contract for the admission of the plaintiff to the theatre, alleged to have been made by them with the plaintiff by the sale of the ticket:—

Held, that the non-disclosure of the fact that the ticket was bought for the plaintiff prevented the sale of the ticket from constituting a contract as alleged, the identity of the plaintiff being in the circumstances a material element in the formation of the contract; and that the action therefore failed.

Semble, a servant who, acting bona fide within the scope of his authority, procures the breach of a contract between his employer and a third person, is not liable to an action of tort at the suit of that third person.

ACTION tried by McCardie J. without a jury.

The facts, material to this report, were as follows: The plaintiff was a Russian gentleman of independent means. The defendant was the chairman and managing director of the Palace Theatre, Ltd. (hereinafter referred to as the company), the proprietors of the Palace Theatre, London.

In July, 1919, a light opera was produced at the Palace Theatre by the company under an agreement with the plaintiff. During the run of the opera differences arose between the plaintiff and the defendant, and the plaintiff made serious charges against the defendant and other officials of the theatre with regard to the sale of tickets for the performances of the opera. These charges were in fact without foundation, though the plaintiff believed them to be true, and they were deeply resented by the defendant

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and other officials of the theatre. The opera was withdrawn on October 18, and December 23 was fixed as the date of the first performance of a new play at the Palace Theatre. The plaintiff desired to be present at the performance on December 23. He twice applied to the company in his own name for a ticket, but his application was refused. The plaintiff, therefore, knowing that any application in his own name would be rejected asked a friend of his, a Mr. Pollock, to buy a ticket for him. Mr. Pollock accordingly bought, in his own name, a ticket from the company for a seat at the performance on December 23 without disclosing, and the company and its staff did not know, that the ticket was bought for the plaintiff. If they had known they would have refused to supply the ticket. The plaintiff paid Mr. Pollock for the ticket, and on the evening of December 23 the plaintiff went to the theatre in order to occupy during the performance of the new play the seat for which the ticket had been bought by Mr. Pollock. The defendant happened to see the plaintiff in the vestibule of the theatre, and he thereupon gave orders to the attendants that if the plaintiff had a ticket he was not to be allowed to occupy his seat and his money was to be returned to him. In consequence of these orders the plaintiff was refused admission to the performance, and he left the theatre. The money paid for the ticket was offered to him but he declined to take it.

The plaintiff claimed in this action damages against the defendant on the ground that he wrongfully and maliciously procured the company to break a contract made by the company with the plaintiff by selling to the plaintiff a ticket for a seat entitling him to witness the performance at the theatre on December 23.

Disturnal K.C. and *St. John Field* for the plaintiff.

Patrick Hastings K.C. and *Beyfus* for the defendant.

Cur. adv. vult.

June 25. McCARDIE J. delivered a written judgment which after stating the facts continued as follows: Upon

the above facts the plaintiff claims damages against the defendant upon the ground that he wrongfully and maliciously procured the Palace Theatre, Ltd., to break the contract made by selling to the plaintiff a ticket entitling him to witness the first performance of "The Whirligig" on December 23, 1919. The circumstances (so far as I have as yet narrated them) appear to be simple, but the questions of law raised by the able arguments of counsel are in many ways novel, and one at least is of great general importance. It is well to state at once one or two points with regard to theatres which seem to be well established. In the first place it is settled by *Hurst v. Picture Theatres* (1): (a) that the purchaser of a ticket for a seat at a theatre has a right to enter and stay and witness the whole performance provided that he behaves properly and complies with the rules of the management; and (b) that the licence granted by the sale of the ticket includes a contract not to revoke the licence arbitrarily. This was the view of Buckley and Kennedy L.JJ., and is now the law, although I confess that I recognize the weighty nature of the dissenting judgment of Phillimore L.J. based on *Wood v. Leadbitter*. (2) If therefore the purchaser of a ticket is physically removed without adequate reason from his seat, and turned out of the theatre, he may bring an action for assault. This is a cogent decision, and it certainly affords a large measure of protection to the purchasers of tickets (whether for reserved or unreserved seats) at theatres or the like places of entertainment. The plaintiff in *Hurst's Case* (1) had paid sixpence, and had received a metal check which entitled him to an unreserved seat. So, too, the purchaser of a ticket is protected if he fails to find an unoccupied seat. In that case he may leave the theatre and demand the return of his money: see *Lewis v. Arnold*. (3) On the other hand the theatrical proprietor is safeguarded by the rule of law (inter alia) that every contract for admission is subject to the implied condition that the person admitted shall behave properly. This rule I do not dwell upon. I need only say,

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(1) [1915] 1 K. B. 1. (2) (1845) 13 M. & W. 838.
(3) (1830) 4 C. & P. 354.

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however, that a member of the audience is entitled to express either his approval or his disapproval of the performance, provided he acts reasonably and with due regard also to the rights of the other members of the audience. If he abuses his privilege, then the management, upon his refusal to leave after being requested to do so, are justified in removing him from the theatre, and in using a reasonable amount of force for the purpose: see per Scrutton J. in *Jay v. New Bedford Palace of Varieties*. (1) The limits to the rights of approval or disapproval are incidentally referred to in *Clifford v. Brandon* (2) and *Gregory v. Duke of Brunswick*. (3)

Now in the present case there is no claim for assault, inasmuch as no assault was actually committed; nor is it suggested that there was any false imprisonment. The case against the defendant rests solely on the ground that he procured the Palace Theatre, Ltd., to break its contract with the plaintiff. Before the plaintiff can succeed he must establish that there was a binding and subsisting contract between the Palace Theatre and himself on December 23: see *Long v. Smithson* (4), per Avory and Shearman JJ. In other words, the plaintiff must bring himself within the words of Lord Macnaghten in *Quinn v. Leathem* (5), who there said: "A violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

Mr. Hastings submitted that no valid contract existed on December 23 between the Palace Theatre, Ltd., and the plaintiff. Broadly put, he contended that the Palace Theatre had never knowingly contracted with the plaintiff for the sale of a ticket for his own use, and that upon discovering that the plaintiff was in fact the purchaser of a ticket for the stalls they would be entitled to put an end to any apparent contract upon the ground that where personal considerations enter into a contract error as to the person with whom the

(1) Times Newsp., June 30, 1910.

(3) (1843) 1 C. & K. 24.

(2) (1809) 2 Camp. 358.

(4) (1918) 118 L. T. 678.

(5) [1901] A. C. 495, 510.

contract is made annuls the contract. This contention rested on the case of *Smith v. Wheatcroft* (1), decided by Fry L.J., then Fry J. In that case the learned judge cited with approval Pothier, *Traité des Obligations*, s. 19, where it is said: "Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand." This passage was also cited with approval by Smith L.J. in the well-known case of *Gordon v. Street*. (2)

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Before I mention the other authorities on the matter it is best to state some further facts which bear on this branch of the case. A first night at the Palace Theatre is, as with other theatres, an event of great importance. The result of a first night may make or mar a play. If the play be good, then word of its success may be spread, not only by the critics, but by the members of the audience. The nature and social position and influence of the audience are of obvious importance. First nights have become to a large extent a species of private entertainment given by the theatrical proprietors and management to their friends and acquaintances, and to influential persons, whether critics or otherwise. The boxes, stalls and dress circle are regarded as parts of the theatre which are subject to special allocation by the management. Many tickets for those parts may be given away. The remaining tickets are usually sold by favour only. A first night, therefore, is a special event, with special characteristics. As the plaintiff himself stated in evidence, the management only disposes of first night tickets for the stalls and dress circle to those whom it selects. I may add that it is scarcely likely to choose those who are antagonistic to the management ;

(1) (1878) 9 Ch. D. 223, 230.

(2) [1899] 2 Q. B. 641, 647.

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or who have attacked the character of the theatre officials. [The learned judge stated in detail the facts with regard to the ticket obtained by the plaintiff through Mr. Pollock and continued :] The Palace Theatre officials had no idea that they were selling a ticket to an agent of the plaintiff. If they had known it, they would at once have refused to supply a ticket. I find as a fact that the plaintiff used the name of Mr. Pollock in order to disguise that he himself was the purchaser ; and I also find that the plaintiff well knew that the Palace Theatre would not have sold him personally a ticket for December 23, 1919. I am satisfied that Mr. Pollock himself was aware of the above-mentioned circumstances. I may point out that a theatre stands on a wholly different footing from a public inn, or a public service such as a railway. A public inn, for example, is under a common law duty to supply to all who come provided that accommodation exists ; and provided also that the guest is of proper character and behaviour. But a theatre stands upon a wholly different footing. It may sell or refuse to sell tickets at its own option. The public cannot compel a theatre to grant admission.

Under these circumstances, the question is whether the plaintiff, as an undisclosed principal of Mr. Pollock, can claim that a binding contract existed between the Palace Theatre, Ltd., and himself. Now, the principle stated in Pothier on Obligations (already cited) is a broad one. It should not, of course, be unduly applied ; but it is one of practical utility. The matter is thus put in Fry on Specific Performance, s. 229 : " The law seems now to be that where one person is deceived as to the real person with whom he is contracting, and that deception either induces the contract or renders its terms more beneficial to the deceiving party, or more onerous to the deceived, or where it occasions any other loss or inconvenience to the deceived party, there the contract cannot be enforced against him ; but that where none of these circumstances can be shown to follow from the deception, the contract may be enforced." This passage seems to accord with *Fellowes v. Lord Gwydyr*. (1) The principle

(1) (1826) 1 Sim. 63.

was recognized by Knight Bruce V.-C. in *Nelthorpe v. Holgate* (1); and the observations of that distinguished judge are most instructive. It is the basis of the decision in *Boulton v. Jones*. (2) It was actually applied by North J. in *Archer v. Stone*. (3) It is cogently illustrated by the decision of the Court of Appeal in the well-known case of *Gordon v. Street* (4) (already cited), the facts of which I need not state. It is not impaired but merely distinguished by the decision of Horridge J. in *Phillips v. Brooks*. (5) It may be usefully considered in the light of such cases as *Hill v. Gray* (6) and *Whurr v. Devenish*. (7)

In my opinion the defendant can rightly say, upon the special circumstances of this case, that no contract existed on December 23, 1919, upon which the plaintiff could have sued the Palace Theatre. The personal element was here strikingly present. The plaintiff knew that the Palace Theatre would not contract with him for the sale of a seat for December 23. They had expressly refused to do so. He was well aware of their reasons. I hold that by the mere device of utilizing the name and services of Mr. Pollock, the plaintiff could not constitute himself a contractor with the Palace Theatre against their knowledge, and contrary to their express refusal. He is disabled from asserting that he was the undisclosed principal of Mr. Pollock.

It follows, therefore, that the plaintiff has failed to prove that the defendant caused any breach of a contract between the Palace Theatre, Ltd., and himself.

I realize, however, that the question is one of difficulty; and I, therefore, deem it right to mention the other legal points which arose in the case. One of those points is of such importance that I feel it my duty to deal with it. Let me, therefore, assume that the plaintiff had established a valid contract between the Palace Theatre, Ltd., and himself, upon which he could have sued as a principal. The defendant's

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(1) (1844) 1 Coll. 203, 214, 218.

(2) (1857) 2 H. & N. 564.

(3) (1898) 78 L. T. 34.

(4) [1899] 2 Q. B. 641.

(5) [1919] 2 K. B. 243, 249.

(6) (1816) 1 Stark. 434.

(7) (1904) 20 Times L. R. 385.

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counsel submitted that even upon such assumption the present action must fail, because the defendant in procuring the breach of contract was acting only as the managing director of the Palace Theatre, Ltd. This submission was ably and fully argued by counsel on both sides. It is well to point out that Sir Alfred Butt possessed the widest powers as the chairman and sole managing director of the Palace Theatre, Ltd. He clearly acted within those powers when he directed that the plaintiff should be refused admission on December 23. I am satisfied, also, that he meant to act and did act bona fide for the protection of the interests of his company. If, therefore, the plaintiff, assuming that a contract existed between the company and himself, can sue the defendant for wrongfully procuring a breach of that contract, the gravest and widest consequences must ensue. This is the more apparent when it is remembered that it is not necessary to prove actual malice against a defendant in order to establish a cause of action against him for knowingly procuring the breach of a third person's contract with the plaintiff, whereby the plaintiff suffers pecuniary damage: see *Pratt v. British Medical Association* (1), citing *South Wales Miners' Federation v. Glamorgan Coal Co.* (2)

If the plaintiff is right in his contention, it seems to follow that whenever either a managing director or a board of directors, or a manager or other official of a company, causes or procures a breach by that company of its contract with a third person, each director or official will be liable to an action for damages, upon the principle of *Lumley v. Gye* (3), as for a tortious act. So, too, with the manager or other agent of a private firm, who does the like thing. This far-reaching result of the principle here suggested by the plaintiff is emphasized, when it is remembered that in an ordinary action for breach of contract the plaintiff recovers his pecuniary loss only; whereas in an action for wrongfully procuring a breach of contract the damages against the wrongdoer are at large, and may vastly exceed the sum recoverable in a mere claim for breach

(1) [1919] 1 K. B. 244, 254, 625.

(2) [1905] A. C. 239.

(3) (1853) 2 E. & B. 216.

of contract against the contractor: see *Pratt v. British Medical Association* (1) and *Exchange Telegraph Co. v. Gregory*. (2).

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Mr. Disturnal for the plaintiff argued with great vigour that though the results may be remarkable, yet the principle asserted by the plaintiff is sound. He points out the breadth of the language employed in the well-known cases on the subject from *Lumley v. Gye* (3) to the present time. I agree that the language is wide in its scope. The proposition is stated with unrestricted diction: that a person who without just cause knowingly procures a man to commit a breach of his contract with another, whereby the latter suffers pecuniary damage, is liable to an action for tort. But I conceive that none of the judges was thinking of such a case as the present. I have searched in vain for any decision which indicates that a servant is liable in tort for procuring a breach of his master's contract with another. If such a cause of action existed, I imagine that it would have been successfully asserted ere this. The explanation of the breadth of the language used in the decisions probably lies in the fact that in every one of the sets of circumstances before the Court the person who procured the breach of contract was in fact a stranger, that is a third person, who stood wholly outside the area of the bargain made between the two contracting parties. If he is in the position of a stranger, he will be *prima facie* liable, even though he may act honestly, or without malice, or in the best interests of himself; or even if he acts as an altruist, seeking only the good of another: see the decisions cited in *Pratt's Case* (4) and the *Glamorgan Coal Case*. (5)

But the servant who causes a breach of his master's contract with a third person seems to stand in a wholly different position. He is not a stranger. He is the alter ego of his master. His acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking

(1) [1919] 1 K. B. 281.

(3) 2 E. & B. 216.

(2) [1896] 1 Q. B. 147, 153.

(4) [1919] 1 K. B. 265, 266.

(5) [1905] A. C. 239.

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the contract he has made, and in my view an action against the agent under the *Lumley v. Gye* (1) principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract. This, I think, is the true answer to the ingenious arguments of Mr. Disturnell on behalf of the plaintiff upon this point. To hold otherwise might create at least three actions whenever a managing director or other authorized agent knowingly procured a breach of the employer's contract. First, an action based on contract against the employer for the pecuniary loss caused by the breach of contract; secondly, an action for tort against the agent who had procured the breach of contract, wherein the damages would be at large and might include every element of annoyance, inconvenience, or indignity; and thirdly, an action against the employer himself for the tortious wrong committed by his authorized agent in procuring the employer to break his contract with the plaintiff. This extraordinary result shows, I think, that the contention of the plaintiff in this case cannot be sound. If the plaintiff here be right in his submission, then the flood-gates of litigation would indeed be widely opened.

I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken. I abstain from expressing any opinion as to the law which may apply if a servant, acting as an entire stranger, or wholly outside the range of his powers, procures his master to wrongfully break a contract with a third person. Nothing that I have said to-day is, I hope, inconsistent with the rule that a director or a servant who actually takes part in or actually authorizes such torts as assault, trespass to property, nuisance, or the like may be liable in damages as a joint participant in one of such recognized heads of tortious wrong. This point was incidentally dealt with by the Court

of Appeal in the recent case of *Belvedere Fish Guano Co. v. Rainham Chemical Works*. (1)

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If I had been in favour of the plaintiff on the preceding points the question as to whether he had what is technically known as "just cause" for procuring a breach of contract would have arisen for decision. I ventured to refer to that most difficult question in *Pratt's Case*. (2) It was touched upon by Astbury J. in his luminous judgment in *Valentine v. Hyde* (3), and by P. O. Lawrence J. in his cogent observations in *Davies v. Thomas* (4), just affirmed by the Court of Appeal. (5) It is not necessary to deal with the point in this litigation; I need only say that it may well be that "just cause" exists in the present case. If the plaintiff had here established a cause of action I should have been called on to assess damages. Upon the whole circumstances of the matter, and in the view I form that the defendant did not act with any actual malice to the plaintiff on the night of December 23, I should have assessed those damages at the nominal sum of 40s. only. But for the reasons I have given, this action fails, and it must be dismissed with costs.

Judgment for defendant.

Solicitors for plaintiff: *Kenneth Brown, Baker, Baker & Co.*

Solicitors for defendant: *Beyfus & Beyfus.*

(1) [1920] 2 K. B. 487.

(3) [1919] 2 Ch. 129, 144.

(2) [1919] 1 K. B. 265, 266.

(4) [1920] 1 Ch. 217, 231.

(5) [1920] 2 Ch. 189.

F. O. R.

C. A.

[IN THE COURT OF APPEAL.]

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Feb. 20.

BLAKEY *v.* SAMUELSON & COMPANY, LIMITED.

Employer and Workman—Compensation—Award of Committee appointed by Secretary of State—Setting aside—Jurisdiction of County Court Judge—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sch. I., clause 9; Sch. II., clauses 12, 16—Workmen's Compensation Rules, 1913–1917, r. 85, sub-s. 2, clauses (a) (b) and (c).

A county court judge has no jurisdiction either under r. 85 of the Workmen's Compensation Rules, 1913–1917, or any provision of the Workmen's Compensation Act, 1906, to set aside an award made by a committee appointed by the Secretary of State under Sch. II., clause 16, of the Workmen's Compensation Act, 1906.

APPEAL from a decision of the judge of the Durham County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

John Thomas Blakey, a workman in the employ of the respondents, Samuelson & Co., Ltd., was killed by an accident arising out of and in the course of his employment. An application for compensation was made by his widow, Margaret Blakey, an adopted daughter, and a married daughter, all claiming to be his dependants. The application was made to a committee, representative of the Durham Colliery Owners' Mutual Protection Association and the Durham Miners' Association, upon whom certain powers had been conferred by an order of the Secretary of State, dated June 25, 1907, made under Sch. II., clause 16, of the Act. (1)

By the order of the Secretary of State it was ordered that the committee might exercise the powers conferred exclusively on county court judges by Sch. I., clauses 7 and 9, of the Act

(1) Sch. II. (16.): "The Secretary of State may, by order, either unconditionally or subject to such conditions or modifications as he may think fit, confer on any committee representative of an employer and his workmen, as respects any matter

in which the committee act as arbitrators, or which is settled by agreement submitted to and approved by the committee, all or any of the powers conferred by this Act exclusively on county courts or judges of county courts. . . ."

as therein modified. Sch. I., clause 9, as modified by the order read as follows: "Where it appears to the committee, on application, that, on account of neglect of children on the part of a widow, or on account of the variation of the circumstances of the various dependants, or for any other sufficient cause, an order or award made by the committee as to the apportionment amongst the several dependants of any sum paid as compensation, or as to the manner in which any sum payable to any such dependant is to be invested, applied, or otherwise dealt with, ought to be varied, the committee may make such order for the variation of the former order or award, as in the circumstances of the case the committee may think just."

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The committee found that Margaret Blakey was the widow and sole dependant of the deceased, and they awarded to her the sum of 300*l.*, which they directed to be invested and paid to her at the rate of 30*s.* a week. She died on March 4, 1919. In September, 1919, an application was made to the county court judge, on behalf of an alleged infant illegitimate grandson of the deceased, to set aside the award on the grounds (1.) that Margaret Blakey was not in fact a dependant; and (2.) that the infant, who was in fact a dependant, had been omitted from the award. It was alleged that the marriage between Margaret Blakey and the deceased was bigamous.

The application was made to the county court with the concurrence of the committee, who considered that they had no power to vary or set aside their award.

On October 21, 1919, the county court judge dismissed the application on the ground that he had no jurisdiction to set aside the award made by the committee. In the course of his judgment he said there was nothing in the Act enabling him to review, set aside, or otherwise interfere with the decisions of a committee. Sch. II., clause 4, which enabled a committee to submit questions of law to the judge, seemed to show that he had no general power to interfere with the award of a committee. It was said that he had that power under r. 85 (2.) of the Workmen's Compensation

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Rules, 1913-1917. (1) But the rules could not confer powers which were not conferred by the Act. The rule in question was made under Sch. II., clause 12, which provides that "rules of Court may be made both for any purpose for which this Act authorises rules to be made, and also generally for carrying into effect this Act so far as it affects the county court, or an arbitrator appointed by the judge of the county court and proceedings in the county court before any such arbitrator. . . ." Reading the rule in the light of that clause it was intended only to enable a judge to deal with awards made by himself, or by an arbitrator appointed by him. It was contended, however, that the words "made by the judge or by an arbitrator appointed by him" which qualified "award" in sub-clause (a), appeared in that sub-clause only, and not in sub-clauses (b) and (c), and that, therefore, although admittedly he would not have power to set aside the award of the committee for fraud under clause (a), yet he had such power in case of mistake as to dependants under clauses (b) and (c). But he thought the word "such" should be inserted in (b) and (c) between the words "any" and "award." If that were not so, he should have to hold that the rule was ultra vires, in so far as it purported to confer on a county court judge power to set aside or vary the awards of committees made within their jurisdiction.

The applicant appealed.

Hedley for the appellant.

Shakespeare for the respondents.

LORD STERNDALÉ M.R. I feel no difficulty whatever about the only question really raised by this appeal, which is whether

(1) Workmen's Compensation Rules, 1913-1917, r. 85, sub-s. 2, provides: "Where the judge is satisfied (a) that any award, or any order as to the application of any amount awarded or agreed upon as compensation, made by the judge or by an arbitrator appointed by him, has been obtained by fraud or other improper means; or (b) that

any person has been included in any award or order as a dependant who is not in fact a dependant as defined by the Act; or (c) that any person who is in fact a dependant as defined by the Act has been omitted from any award or order the judge may set aside or vary the award or order. . . ."

the learned county court judge was right in holding that he had no jurisdiction to deal with the application to set aside the award of a committee appointed by the Secretary of State. I entirely agree with him that there is nothing in the Workmen's Compensation Act, 1906, enabling a county court judge to set aside the award of a committee unless it exists in r. 85.

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It is argued that because sub-clauses (b) and (c) of clause 2 of that rule say that he may set aside "any award or order" they do not restrict him to dealing with awards made by himself or an arbitrator appointed by him; so that he has power to set aside any award or order made by a committee or by anybody else. There are two answers to that. First, I do not think that is the proper meaning of the rule. I think the award or order mentioned in (b) and (c) and in the operative part which follows, is the award or order mentioned in (a)—and that is an award or order made by the judge himself or by an arbitrator appointed by him. That answer suffices if it is right. But there is another one. If the rule meant to confer power upon a judge to set aside an award made by a committee appointed as this committee was, not by himself, but by another person, then it would be ultra vires because the power to make rules does not include power to give a judge by rules a jurisdiction which he does not possess.

I think therefore that the county court judge was quite right in holding that he had no jurisdiction to set aside this award.

But we have been asked to give an opinion upon another and a more difficult point. The committee have made an award of 300*l.* to the widow, or so-called widow of the deceased workman—her matrimonial affairs seem to have been somewhat complicated—and it now appears that there is an illegitimate grandson of the deceased man who says that he has been improperly excluded from participation in the compensation money. It is said that that might be put right by the committee itself under Sch. I., clause 9, of the Act, as modified by the order of the Secretary of State; and it is also suggested

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1920 the dependants were; that they have made an award to one
BLAKEY dependant, but have not said whether or not there were other
v. dependants; and that the existence of another dependant is
SAMUELSON a "sufficient cause" within that clause for the committee
& Co. to vary the apportionment they have made. All I shall say
Lord Sterndale about that is that the judgment which I have given as to
M.R. the county court judge's jurisdiction is entirely without
prejudice to any application which may be made to the
committee on that suggestion. If they come to the con-
clusion that they have not finally decided who were the
dependants, and that they have power to vary, they will do
so. I only say that my decision is without prejudice to any
such application being made.

WARRINGTON L.J. I agree, and have nothing to add
to the first part of the judgment of the Master of the Rolls.
It is clear that the county court judge had no jurisdiction
to make the order he was asked to make.

I am not sure, speaking for myself, that I am not prepared
to go a little further than the Master of the Rolls with regard
to the powers conferred on the committee by Sch. I., clause 9,
as modified by their order, and I should like to say this.
At the time the original award was made by the committee
it appears that there was in existence—assuming it to be
proved—a dependant other than the so-called widow. In
the first place is it reasonable to contend that the award of
the committee did not include an order for apportionment?
It is true that they were not informed of the existence of the
other dependant and that they directed the whole sum to
be paid to the only dependant of whom they knew, but still,
upon construction the award plainly contains an order for
the apportionment of the compensation. If that is so I
suggest for the consideration of the committee whether it is
not within their power to say that the fact that they were not
then, but are now informed that there was another dependant,
is not within Sch. I., clause 9, as modified by the order
of the Secretary of State, a "sufficient cause" for them to

make an order varying their original award. I cannot say more than that, but I think I can go so far as that.

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YOUNGER L.J. I am of the same opinion, and have nothing to add.

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Appeal dismissed.

Solicitors for appellant: *Hyman, Isaacs, Lewis & Mills, for H. F. Heath, Sunderland.*

Solicitors for respondents: *Gardiner & Co.*

G. A. S.

[RAILWAY AND CANAL COMMISSION.]

MINISTER OF MUNITIONS *v.* MACKRILL.

1920
June 22;
July 1.

Defence of the Realm—Acquisition of Land compulsorily—Land in Possession of Government Department—Land on which Buildings erected for Purposes of War—Buildings erected at Expense of State—Defence of the Realm (Acquisition of Land) Act, 1916 (6 & 7 Geo. 5, c. 63), s. 3, sub-ss. 1, 4; s. 13, sub-s. 5.

By s. 3, sub-s. 1, of the Defence of the Realm (Acquisition of Land) Act, 1916: "Subject to the provisions of this Act it shall be lawful to acquire by agreement or compulsorily on behalf of His Majesty—(a) any land in the possession of an occupying department or any interest in such land; (b) any land on over or under which any buildings . . . have, for purposes connected with the present war, been erected constructed or made wholly or partly at the expense of the State, or any interest in such land."

Sect. 13, sub-s. 5: "Nothing in this Act shall authorise the compulsory acquisition of land without the consent of the [Railway and Canal] Commission where the purposes for which it is to be acquired are purposes other than those for which land can be acquired under the Defence Acts, 1842 to 1873, or the Military Lands Acts, 1892 to 1903."

A piece of land was used by the respondent, a builder, as a yard in which to store his building materials and for constructional and other work. In 1916 the Minister of Munitions took possession of the land for the purpose of manufacturing munitions of war, and buildings of a permanent nature were erected thereon by the State at a cost of 2500*l.* In 1919 the Minister of Munitions entered into an agreement to sell to a distillery company the land with the buildings thereon, at a price which represented the cost to the Minister of obtaining the land, together with the value of the buildings, which were agreed to be 500*l.* The

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respondent, who had been unable to find other suitable land within a reasonable distance, and who would be seriously hampered in his business if he were permanently deprived of the yard, refused to part with the land. The Minister thereupon applied, under s. 3 and s. 13, sub-s. 5, of the Defence of the Realm (Acquisition of Land) Act, 1916, for the consent of the Railway and Canal Commission to the compulsory purchase of the land:—

Held (1.) that, as the Court was intended to protect the subject against any undue exercise of the power of the Crown to deprive him permanently of his property, it ought, before exercising its discretion in favour of the Crown, to be satisfied not only that the conditions precedent to the application had been fulfilled—namely, that the Minister of Munitions was lawfully in possession and that buildings of a permanent nature had been erected on the land at the expense of the State for the purposes of the war, but also that the application was, on its merits, a proper one to which to accede; (2.) that the compulsory powers given by the Act were not intended to be exercised when the Crown did not require the land at all or where it only required it in order to sell it to some other person, and the Court ought not to consent to the compulsory acquisition of land merely because a substantial loss to the State would thereby be avoided; (3.) that the Court had to consider not only whether the proposed order was expedient from a public point of view but also whether it would work a hardship and injustice to the respondent if he were compulsorily deprived of his property; (4.) that the fact that the respondent would obtain compensation was not sufficient to justify the Court giving its consent; and (5.) that on the facts the Court should refuse its consent.

APPLICATION by the Minister of Munitions under s. 3, sub-ss. 1 and 4, and s. 13, sub-s. 5, of the Defence of the Realm (Acquisition of Land) Act, 1916, for an order authorizing him to acquire compulsorily a piece of land situated at Chancellor's Road, Hammersmith, the property of the respondent.

The piece of land in question had an area of about 308 square yards, and adjoined the premises of the Hammersmith Distillery Co. Ltd. Early in 1916 it was decided by the Minister of Munitions to make use of the premises of the Distillery Company for the manufacture of munitions of war—namely, acetone—and for that purpose additional plant was required. The Minister of Munitions accordingly, on May 16, 1916, took possession of the piece of land in question under the powers conferred by the Defence of the Realm (Consolidation) Act, 1914, and the Regulations made thereunder, for the purpose of erecting a factory thereon for the manufacture

of acetone, and buildings of a permanent nature were erected thereon at the expense of the State, costing about 2500*l*. A fire subsequently occurred, the buildings being thereby seriously damaged, and they had not been repaired. It was agreed that the value of the buildings at the time of the application in their damaged condition was about 500*l*. The Minister of Munitions, on October 13, 1919, entered into an agreement to sell to the Hammersmith Distillery Company the piece of land in question, with the buildings thereon at a price which represented the cost to the Minister of Munitions of obtaining it from the respondent (including interest and legal expenses) together with the value of the buildings, which was agreed to be 500*l*. The buildings as erected by the Minister of Munitions on the piece of land infringed the London Buildings Acts by projecting beyond the building line, and the local authority insisted upon the buildings being brought back to the building line, and therefore about one-third of the buildings would have to be pulled down.

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The respondent, who was a builder, had used the piece of land for many years as a yard in which to store his building materials and for constructional and other works. The piece of land was close to his office and he had been unable to find other land within a reasonable distance at all suitable for his purpose. He had for a time used a yard which was considerably smaller, paying a rent therefor of 13*l*. a year, but that yard was almost useless for his purpose, and had been given up. As a result of being deprived of the piece of land in question the respondent had been hampered in his business. He accordingly refused to agree to the acquisition by the applicant of the piece of land.

The Minister of Munitions thereupon applied for the consent of the Railway and Canal Commission to the compulsory purchase of the land, alleging that public funds to the extent of 2500*l*. had been expended in the erection of the factory, and that if the land was not purchased by the applicant the factory would have to be removed, and only a small fraction of its value would be recovered, and in addition the land would have to be reinstated or compensation paid in lieu thereof ;

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but that if the consent of the Court was given the piece of land together with the factory could be sold in pursuance of the agreement with the Distillery Company on terms which would enable the public funds to be recouped a considerable portion of the expenditure which had been incurred.

The respondent in his answer said that the purpose for which the Minister of Munitions required the land was to transfer it forthwith to the Hammersmith Distillery Company for use by that company in its business, which was not a purpose for which it had been used during the war, or a purpose for which it could have been used had it been acquired under the Defence Acts, 1842 to 1873, or the Military Land Acts, 1892 to 1903, and that in the circumstances the Minister of Munitions was not authorized by the Defence of the Realm (Acquisition of Land) Act, 1916, to acquire the land compulsorily, and that it was not a case in which the consent of the Court should be given to the compulsory acquisition of the land.

The respondent had not been given an opportunity of buying the buildings, but he stated in evidence that he was willing to give 500*l.* for them; that he could not carry on his business as a builder successfully without a yard, and that there was no other yard which he could acquire near his office.

Evidence was given on behalf of the Minister of Munitions that if the buildings had to be removed the net cost of removing them and reinstating the site after allowing for the value of the materials would be about 375*l.*

The purpose for which the land was sought to be acquired was not a purpose for which land can be acquired under the Defence Acts, 1842 to 1873, or the Military Land Acts, 1892 to 1903.

Sir Gordon Hewart A.-G. and *G. A. H. Branson* for the Minister of Munitions. This application for the consent of the Railway and Canal Commission for the compulsory acquisition of this land is made under s. 3, sub-ss. 1 and 4, and s. 13, sub-s. 5, of the Defence of the Realm (Acquisition of Land) Act, 1916, because the purpose for which the land is

sought to be acquired is a purpose other than those for which land can be acquired under the Defence Acts, 1842 to 1873, or the Military Land Acts, 1892 to 1903. There is no provision in those sections as there is in s. 1, sub-s. 1, in the case of an application for the consent of the Commission to the continuation of the possession of land occupied for the purpose of the defence of the realm, and in s. 13, sub-s. 1, in the case of an application for the consent of the Commission to the compulsory acquisition of a park, garden, pleasure ground or farm, that the Commission should be satisfied that it was expedient in the national interest that the occupation of the land should be continued, or that it was of national importance that the park, garden, etc., should be acquired, and therefore in dealing with applications for the consent of the Commission to the compulsory acquisition of land other than the specific classes mentioned in s. 13, sub-s. 1, it is not necessary that the acquisition should, in the opinion of the Commission, be of national importance. There are certain conditions precedent laid down in s. 3—namely, that the land which is sought to be acquired compulsorily is in the possession of an occupying department, or that it is land on which buildings have, for purposes connected with the war, been erected wholly or partly at the expense of the State. All that is required is that the Commission should be satisfied that those conditions precedent have been fulfilled. As soon as the Commission is satisfied that those conditions precedent have been fulfilled the Commission is bound to give its consent to the compulsory acquisition of the land. If however the Commission is entitled to take into account the question of national importance with regard to the acquisition of the land, it is of national importance that the land should be acquired in order that a considerable portion of the sum expended on the building should be recovered and not be thrown away. If the consent of the Commission is given and the buildings have not to be removed there will be a saving to the Government of about 875*l*. The buildings that have been erected on this land are of a permanent nature and therefore,

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under s. 5, sub-s. 3, there was no obligation on the Government department to offer them first to the respondent. The department was entitled to get the best offer it could for them. The Commission, in deciding whether it ought to give its consent, is not entitled to take into account any hardship on the owner of the land, because that is a matter for which he will receive compensation.

Heber Hart K.C. and *James Wylie* for the respondent. The Commission has no jurisdiction to give its consent to the compulsory acquisition of this land. The Act of 1916 enables land to be compulsorily acquired by a Government department (with the consent of the Commission), but when the Act is looked at as a whole it is clear that the land can only be acquired for the purposes of that department: see s. 3, sub-ss. 2, 3 and 4, and s. 4. Under s. 5, sub-s. 1, a Government department has power to sell land which it has already acquired for a public purpose, if that purpose has ceased to be operative. In the present case the Minister of Munitions does not want to acquire this land for the purposes of his department but in order to sell it again immediately in order to minimize the pecuniary loss which the department has sustained. If the Commission has jurisdiction to entertain the application it will, in the exercise of its judicial discretion, refuse its consent to the compulsory acquisition of this land. In considering whether or not it will exercise its discretion the Commission will have regard to the amount of money which the State will obtain if the consent is given; and secondly, to the hardship on the owner. Even if the consent of the Commission is given to this application the State will only be recouped about one-fifth of its original expenditure; one-third of the building will have to be demolished in any event. Further the applicant has not satisfied the Court that the respondent will not himself give as much for the buildings as the Distillery Company are going to give, and therefore there is no evidence that money will be saved to the Exchequer if the consent is given, and accordingly it has not been made out that it is in the national interest that the consent of the Commission should be given to the acquisition of this land.

The Commission ought also to take into account the serious injury that will be done to the respondent in his trade as a builder if consent is given to the compulsory acquisition of this land, through being deprived of this building yard, which is only sought to be acquired in order that it may be sold to the Distillery Company for use in their business. Therefore, as a matter of fairness and justice, consent ought not to be given to the acquisition of this land. The Commission in deciding whether or not its consent ought to be given to this application ought not to pay any regard to the fact that the respondent may receive some compensation. That is a mere consequence which follows from the compulsory acquisition of the land.

G. A. H. Branson in reply. One of the main objects of the Act was to provide machinery so that where buildings have been erected upon land at the public expense the public may be reimbursed some part of the expense that has been incurred. The Act contemplated that land could be acquired for purposes other than for the purposes of the naval and military forces and for the defence of the realm—only in that event the consent of the Commission must be obtained. If buildings are erected upon a man's land, at common law the buildings become part and parcel of the land, and therefore when the time limited by the Act has expired if the consent of the Commission is not given to the compulsory acquisition of the land by the State the owner of the land can either keep the buildings without paying anything for them and thus obtain the benefit of the expenditure which the State has made, or else require the land to be reinstated, in which case the State will be put to the additional expense of removing the buildings. No limitation is placed by the Act upon the power to acquire land either compulsorily or by agreement.

Cur. adv. vult.

July 1. The following written judgments were delivered.

LUSH J. This case raises a question of considerable importance which comes before us for the first time,

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as to the conditions under which the Crown, after taking temporary possession of the land of a private owner and erecting buildings on it for purposes connected with the war, is entitled to acquire the property by compulsory purchase.

The facts are these. The Minister of Munitions took possession, for the purpose of manufacturing munitions of war, of some premises at Hammersmith which belonged to the respondent, who is a builder, and which he had been in the habit of using for storing his building materials. Buildings of a permanent nature were erected upon the land at a cost of 2500*l*. A fire occurred there a year or two ago and the buildings were seriously damaged. Their value as they stand is, it is agreed, about 500*l*. The Minister of Munitions asks for our consent to the acquisition by him of the land and buildings under the circumstances I am about to mention. Under the Defence of the Realm (Acquisition of Land) Act, 1916, the Crown is entitled to retain possession of the premises for two years from the termination of the war or for "such further period, not exceeding three years from the expiration of such two years, as the Commission"—that is this Court—"may consider necessary or expedient in the national interest." That is s. 1, sub-s. 1. This power is made subject to the department not having agreed otherwise with the owner when possession was taken (s. 13, sub-s. 3). But the land cannot be acquired against the will of the owner unless the purposes for which it is required are within the purposes for which land can be acquired under the Defence Acts, 1842 to 1873, and the Military Lands Acts, 1892 to 1903, or the Naval Works Act, 1895, without the consent of this Court (s. 13, sub-s. 5, and s. 12, sub-s. 4). The purposes for which land can be acquired under these earlier Acts are certain military or naval purposes, the Crown being authorized to acquire land in order to use it for purposes of defence. This power of compulsory purchase is also subject to no agreement to the contrary having been made with the owner (s. 13, sub-s. 4). The respondent, the owner of these premises, was unwilling to part with the property, and the purposes

for which the acquisition of it is required is not within the above-mentioned Acts. The Minister of Munitions has accordingly applied to the Court for consent to the compulsory purchase of it. The purpose for which the acquisition of the land is required is this. The Minister of Munitions has entered into a contract with a distillery company to sell the land with the buildings upon it to them at a price which is represented by the cost to the Minister of Munitions of obtaining it from the respondent, that is, the sum to be fixed by an arbitrator, adding interest and legal expenses and the value of the buildings. The Minister of Munitions does not therefore really require the land at all. He would not use it; he would not be able to use it; he only wants to take it from the respondent in order to sell it to recoup to the department part of the moneys that have been expended in erecting the buildings and avoid the loss which the Crown says will necessarily have to be incurred in removing the buildings. Sect. 2, sub-s. 1, of the Act says this: "Whilst any land of which possession has been so taken is in the possession of an occupying department after the termination of the present war, any building or other work which for purposes connected with the present war has been erected or constructed on over or under the land wholly or partly at the expense of the State may be removed, without the consent of any person interested in the land, by the occupying department." Sub-s. 2 says: "Where any building or work has been removed under the powers conferred by this section the occupying department shall cause the land to be restored to the condition in which it was before the building or work was erected." Then follows a provision with regard to compensation. Sub-s. 3 says: "Where any such buildings or works have been erected or constructed upon any common, open space, or allotment the building or work shall be removed and the land restored as aforesaid," with certain exceptions which again it is not necessary for me to read. The value of the materials if these buildings are removed will not equal the cost of the removal. I deal with the case on the

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assumption that this loss will be incurred if our consent is withheld.

Now the first question to consider in determining whether our consent ought or ought not to be given is this: by what principle ought we to be guided in deciding the question? No reference is made to it in the section under which the application is made. Sub-s. 1 (b) of s. 13, which provides for the Minister of Munitions compulsorily acquiring under an order of this Court the whole or part of a park or garden where possession has been taken of part for war purposes, says that this Court "may by order authorise the compulsory acquisition of the park, garden, pleasure ground, or farm, or any part thereof, where they are satisfied that it is of national importance that it should be acquired." The principle on which we should act in considering whether to make an Order under that section is there stated. What we have to consider on an application under that section is whether it is of national importance that the whole or part of the park, etc., should be acquired. We dealt with an application under that section in the recent case of the *Minister of Munitions v. Chamberlayne*. (1) Again in s. 1, sub-s. 1, which as I have said, empowers the Crown to continue in possession "for such further period, not exceeding three years from the expiration of such two years, as the Commission may consider necessary or expedient in the national interest," the principle on which we should act is stated; but in a case like the present no express reference is made to it. The matter, so far as express reference is concerned, is left at large.

The Attorney-General in one part of his argument contended that all we have to consider is whether the conditions precedent to the making of the application have been fulfilled—namely, whether the Minister of Munitions is lawfully in possession and whether buildings of a permanent nature have been erected on the land. He said that if we are satisfied of these facts we must exercise our discretion in favour of the Crown. I entirely disagree

(1) [1918] W. N. 107; [1918] 2 K. B. 758 in C. A.

with this contention. The statute in speaking of "consent" means what I think it clearly says, that we must not only be satisfied that the application can properly be made, that is that the conditions precedent have been fulfilled, but that it is under the circumstances a proper one to which to accede, whatever the test may be by which the propriety of it is to be judged. The Court is intended to protect the subject against any undue exercise of the power of the Crown to deprive him permanently of his property, and if we think in our discretion, acting, of course, judicially, that the circumstances are such that the power ought not to be exercised, I feel no doubt that it is our duty to prevent its being exercised by withholding our consent.

It was further contended that at all events we ought to consent to the compulsory acquisition of the land if thereby a substantial loss to the State will be averted. It is in the national interest, it is said, or of national importance, that this object should be secured, and no restriction being placed in the Act on the purposes for which the land is required we ought to sanction the purchase. The owner, it is said, will be properly compensated by the payment of the sum to be fixed by the arbitrator. The same argument would seem to apply if a substantial profit could be made by the compulsory purchase and resale of the land. This is a large claim and it raises a large question. Land includes mines and minerals (s. 3, sub-s. 3). If any Government department is in possession of any land, or if any buildings have for war purposes been erected even partly at the expense of the State, the Crown may, according to this argument, compulsorily acquire the land with the consent of this Court, and we ought to consent if the Crown can avoid pecuniary loss or make a pecuniary profit by the purchase. I do not see why, if this argument is right, the Crown cannot purchase additional land from an adjoining owner, and why it should not under s. 13, sub-s. 1, acquire the whole of a "park" if buildings for the manufacture of munitions of war have been erected on part of it and so increase the profit that would be made. It is of national importance, it is said, that loss should be

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avoided or a profit made. If so, these sections, that is, s. 3, sub-s. 2, and s. 13, sub-s. 1 (b), which equally with s. 13, sub-s. 5, say nothing about the user of the land, would apply, and the Court ought to give its consent to the further compulsory acquisition. I cannot agree with this contention. We must, in my opinion, before deciding whether to give or withhold our consent to the compulsory acquisition of land, consider whether the Government department really require it, need to have it and use it for national purposes, or, at all events, see whether they can make an advantageous use of it. If they prove that they need it or can so use it, it was, I think, intended that we should sanction their acquiring it, if in the exercise of our discretion we think that under all the circumstances it is right to do so, just as in the case of an application for leave to continue in possession for more than two years. But it was not in my opinion ever contemplated by the Act that the compulsory powers should be exercised where the Crown do not really want the land at all, and where they only take it in order to sell it to some other person or to carry into effect a contract to sell it which has already been entered into. Under the Defence Act of 1842 and the other group of Acts referred to in s. 13, sub-s. 5, which so far as the acquisition of land is concerned are in *pari materia* with this Act, the power of compulsory purchase was only given where the land itself was wanted for national defence, and throughout the Act of 1916 it is, I think, assumed that the same principle applies. Sect. 3, sub-s. 2, gives power to acquire any adjoining land or easement if it appears to the Commission to be required for the proper enjoyment of the land so acquired. Sect. 4 refers to the purposes for which the land may be used by the department. It says: "Any land which, or an interest in which, has been acquired under this Act may be used by any Government department for the purpose for which it was used during the war or for any other purpose for which it could have been used had the land been acquired under the Defence Acts, 1842 to 1873, or the Military Lands Acts, 1892 to 1903, notwithstanding that such user could, but for this Act, have been restrained as being in contravention of any

covenant or for any other reason. . . .” Sect. 5, sub-s. 1, says this : “ Where any land or any interest therein has by virtue of this Act been acquired by any Government department, the department may at any time thereafter sell, lease, or otherwise dispose of the land or interest.” This seems to me to contemplate a subsequent sale after the department has bought and used the land. It provides that if it is afterwards found unnecessary to keep the land it may be sold, but it assumes, I think, that when acquired it was intended to use it, and power is given to the Court by s. 8, sub-s. 2, to hold a local inquiry with a view to assisting us in our consideration of the utility for national purposes of the lands which it is proposed to acquire. Moreover, I do not think that if we were to sanction this purchase the Crown could be said to be acquiring the land at all, in any real sense. The conveyance would naturally be taken direct to the Distillery Company ; that Company would be the equitable owners, and the Company would, I think, be really acquiring the land and not the Crown. I find it difficult to see why the Legislature should have enacted in s. 5, sub-s. 3, that if buildings of a permanent nature are erected the Minister of Munitions need not offer the land in the first instance to the owner if this kind of transaction was contemplated. One would have thought that the owner would have been the first person to whom the land with the buildings on it should be offered if the Crown only bought it in order for resale. The reason why s. 13, sub-s. 5, was framed as it is, is, in my opinion, this ; that under the development of modern warfare land can be put to many uses which are not, strictly speaking, or may not be, military purposes at all ; purposes of research and experiment, for example, and it was intended, I think, that the Court should consider each case on its merits if the proposed purpose was not strictly a military or naval purpose, and decide whether, under all the circumstances, the order ought to be made. The other view for which the Crown contend would enable a department to compulsorily deprive an owner of land merely in order to make a profit out of it at his expense. The power to compulsorily purchase land and take it from the owner against his will at a

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price to be fixed by the arbitrator has hitherto been confined to cases where the land will be put to some use from which the community will derive some benefit. If the statute has given to the Crown in clear terms the right which is claimed, we, of course, have nothing to do but to enforce it. But the power is certainly not given in clear terms. In my opinion it is not given at all. For these reasons, I think, apart from the special circumstances of this case, that we ought to withhold our consent.

But I do not wish to confine my judgment to the general ground. On the special facts of this case, I am of opinion that even if the purpose is a legitimate and proper one, we still ought to withhold our consent. On an application under this section we must, I think, consider not only whether the proposed order is expedient from the public point of view, but whether it would work a hardship and injustice on the owner. It is not enough to say that he would obtain compensation. He ought not to be compulsorily deprived of his property for such a purpose as the Crown have in view in this case, unless it is just and right to compel him to part with it. The respondent will be seriously hampered in his business if he is deprived of these premises. It is the only place he can get in which to store his building materials, and it is conveniently situated near to his business premises. He has had to discharge some of his men through being deprived of the possession of it. The Minister of Munitions, though I agree that he is not bound to do so, has not given him the offer of repurchasing, and has contracted to sell the buildings to another firm. The Minister of Munitions has not proved that the respondent will not pay the same price. He has not proved that the Distillery Company are paying an advantageous price to the Minister of Munitions. In fact, the respondent stated, and I have no doubt truthfully, especially considering the terms of the contract with the Distillery Company, that he is prepared to enter into a contract on the same terms. He can adapt and use the buildings in his business, and will be glad to have them. The Minister of Munitions, if this is done, will suffer no loss at all. If we give our consent to the application, we shall, as

I have said, be really consenting to the Distillery Company acquiring the premises. I do not think that we ought to do that, even assuming that the purpose is a proper and legitimate one within the meaning of the Act, and therefore in any view of the matter I am of opinion that we must refuse our consent to the application.

With regard to the costs we have power under this Act to deal with them, and, in my opinion, the respondent must have his costs.

MR. MACNAMARA. This is an application under the Defence of the Realm (Acquisition of Land) Act, 1916—a statute prepared for the purpose of making provision as to the possession and acquisition of land which was occupied and used for the defence of the Realm in connection with the war. Sect. 3, sub-s. 1, of the Act provides that: "Subject to the provisions of this Act it shall be lawful to acquire by agreement or compulsorily on behalf of His Majesty—(a) any land in the possession of an occupying department or any interest in such land; (b) any land on over or under which any buildings . . . have, for purposes connected with the present war, been erected constructed or made wholly or partly at the expense of the State, or any interest in such land."

One of the provisions of the Act to which this wide enactment is subject, is to be found in s. 13, sub-s. 5, which enacts that "Nothing in this Act shall authorise the compulsory acquisition of land without the consent of the Commission where the purposes for which it is to be acquired are purposes other than those for which land can be acquired under the Defence Acts, 1842 to 1873, or the Military Lands Acts, 1892 to 1903."

In 1916 the Minister of Munitions under the powers conferred upon him by the Defence of the Realm (Consolidation) Act, 1916, took compulsory possession of a piece of land, the property of the respondent situate in Chancellor's Road in the parish of Hammersmith, for the purpose of erecting a factory for the manufacture of acetone. The factory was completed

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and the land is still in the occupation of the Ministry of Munitions.

The Minister of Munitions now applies to this Court for an order authorizing the compulsory acquisition of the land of the respondent. The grounds on which the application is based are stated as follows : " Public funds to the extent of approximately 2500*l.* have been expended in the erection of the said factory. If the said parcel of land is not purchased by the applicant the said factory must be removed in which case a building of considerable utility for industrial purposes will be demolished and only a very small fraction of its value will be recovered and in addition the said parcel of land will have to be reinstated or compensation will have to be paid in lieu of reinstatement which will constitute a further charge on public funds. On the other hand if the consent of this Honourable Court is obtained and the said parcel of land is purchased the said parcel of land together with the said factory can be sold in pursuance of an agreement dated the 30th day of October, 1919, made between the applicant and the Hammersmith Distillery Co., Ltd., on terms which will enable public funds to be recouped a considerable portion of the expenditure which has been incurred." In answer to this the respondent in his pleading states that " The said land was and is of great importance to the respondent in his business as builder and decorator as a store yard for his materials and as a yard for constructional and other works, and was so used by him (with the exception of a part which he sublet at 2*s.* a week) from 1896 till the date when the applicant took possession. It is close to his office and he has been unable to find any other land within any reasonable distance at all suitable for his purpose and during the possession of the land by the applicant he has been compelled to use temporarily a yard considerably smaller, paying 13*l.* a year for a yard which is almost useless for his purpose. As a result he is and will be hampered in his business particularly in view of the revival of the building trade and there is no available land which will compensate him for the loss of the land now in question and he will submit that this is not a case in which consent to the compulsory

acquisition of the said land should be given by the Honourable Court."

The learned Attorney-General submitted that all the Court had to do was to see that conditions precedent were fulfilled—that the Ministry was in possession of the land and had erected permanent buildings on it—and the Court being satisfied of that should exercise its discretion in favour of the Crown. I disagree with this contention for the reasons stated in my Lord's judgment.

I express no opinion on the question for what purpose must the Crown apply to acquire the land, because this case on the conclusion I have arrived at can be decided without doing so.

The respondent, the owner of the land, is not entitled to pre-emption under s. 5, sub-s. 3, of the Act, but he stated in the witness box that he was willing to pay 500*l.* for the building, which is the admitted value. That is also the price that the Distillery Company are to pay the Minister of Munitions if the agreement between them is carried out.

The Court must consider whether it is a case in which the loss to the respondent of being deprived of the land can be adequately provided for under the compensation sections of the statute. The respondent does not desire compensation but the return of his land, which he was willing should be occupied during the period of the war for the purpose of the war. The land which he temporarily rented during the war is no longer available.

The respondent says that the land, the subject of the application, is essential to his business and that he cannot get any other suitable land. No evidence was given on behalf of the applicant contradicting this. What Lord Terrington said in his judgment in the case of *Minister of Munitions v. Chamberlayne* (1) (the first case in this Court under the Defence of the Realm (Acquisition of Land) Act, 1916) I desire to quote and adopt. He said, "I agree in the view that in considering these applications, and in exercising the wide discretion entrusted to them by the Legislature, the Court

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must have regard to all the facts and circumstances of each particular case, and whilst guarding the interests of the State where considerable sums of money have been expended, must be careful to see that the State does not use the power given to them by the Statute in a way which would work undue hardship to the individual whose property is expropriated."

I am of opinion that the Court in the exercise of its judicial discretion should not give its consent to this application on the ground that it would work undue hardship to the respondent—a hardship which compensation would not do away with.

The application for consent must be dismissed with costs.

Application refused.

Solicitor for Minister of Munitions : *Treasury Solicitor.*

Solicitor for respondent : *Lewis W. Taylor.*

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BEHREND & COMPANY, LIMITED v. PRODUCE
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Sale of Goods—Contract—Shipment in Alexandria—Delivery in London to Buyers' Craft alongside—Arrival of Ship—Delivery of Part—Departure of Ship—Subsequent Return—Tender of Balance—Right of Buyers to reject—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30.

By two contracts in similar terms cotton seed was sold, to be shipped in Alexandria and delivered in London to buyers' craft alongside, payment to be in London in exchange for shipping documents. On the arrival of the ship in London, and after payment by the buyers, a portion of the seed was delivered into the buyers' barges. The ship then left for Hull with the remainder of the seed on board in order to discharge other cargo. The ship returned to London in fourteen days and the balance of the seed was tendered to the buyers, but they refused to accept it. The buyers retained the portion which had been delivered and claimed repayment of the price paid for the rejected portion :—

Held, that when the delivery had begun the buyers were entitled to receive the whole quantity before the ship left the port, and that in

the circumstances the buyers were entitled to keep the part actually delivered and to reject the balance and to be repaid the price of the balance.

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AWARD in an arbitration stated in the form of a special case.

By two contracts in writing dated July 8, 1919, and September 12, 1919, Behrend & Co., Ltd. (hereinafter called the sellers), sold to the Produce Brokers Co., Ltd. (hereinafter called the buyers), 200 tons of Sakellarides Egyptian cotton seed at 32*l.* per ton, and 500 tons of Fayumi Egyptian cotton seed at 26*l.* per ton.

The contracts, which contained clauses in identical terms, provided that the goods were to be shipped per steamer from Alexandria; the seed to be delivered in London to buyers' craft alongside; particulars of shipment to be declared in London within twenty-four hours after receipt of documents in this country; payment to be made in London in fourteen days from the seed being ready for delivery by net cash in exchange for shipping documents and/or delivery order; the seed to be worked and received (during custom-house hours) immediately it was ready for delivery from the steamer.

The sellers gave notice to the buyers that they appropriated 176 tons and 400 tons per steamship *Port Inglis* in part fulfilment of the contracts; these appropriations were accepted by the buyers; and these quantities were shipped at Alexandria in the *Port Inglis* under bills of lading dated September 12, 1919. The steamer docked at Regent's Canal Dock, London, on October 13, 1919, and on the following day the buyers duly paid the sellers for the 176 and 400 tons and took up the bills of lading. The steamer commenced her discharge on October 14. The buyers duly presented the bills of lading and were ready and willing to take the whole bill of lading quantity. On October 17 and 18, fifteen tons of Fayumi seed and twenty-two tons of Sakellarides seed were delivered to the buyers. The steamer then proceeded to Hull with the remainder of the 176 and 400 tons of seed still on board, in order to discharge cargo destined for Hull

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which had been loaded on the top of the remainder of the seed. By a letter of October 21 the buyers gave notice of arbitration and contended that the vessel had completed her voyage and that the contracts were at an end, and they requested the return of the amounts paid against the undelivered quantities.

The steamer returned from Hull without undue delay and arrived in London on November 3 and proceeded with the discharge of the balance of the seed. The discharge was completed on November 11. By agreement between the parties the buyers took delivery of the balance of the seed without prejudice to their rights under the contracts. It was contended in the arbitration for the sellers that they had completed their obligations by delivering documents against payment; that the buyers' rights (if any) were limited to recovering damages for breach of contract; that the sellers had not been guilty of any breach of contract and were not responsible for the act of the shipowner in proceeding to Hull before delivering the balance of the goods; that even if the sellers had been guilty of a breach of contract, that did not justify the buyers in claiming to reject part of the goods or in claiming repayment of an appropriate amount, and that the damages were limited to the cost of insuring the undelivered balance from London to Hull and back, together with interest on the proportionate purchase price during the delay consequent thereon.

It was contended for the buyers, *inter alia*, that the sellers failed to deliver the goods in accordance with the contract; that the ship after making partial delivery had abandoned the voyage and sailed to another port; and that the buyers were thereupon entitled to claim a refund of the amounts paid by them for the seed which the sellers had failed to deliver.

The umpire awarded in favour of the buyers' contention.

The question for the opinion of the Court was whether the buyers were bound under the contracts to take delivery of the balance of 385 and 154 tons of seed loaded on the steamer on her return to London on November 3.

Jowitt (R. A. Wright K.C. with him) for the sellers. If the act of the ship in going to Hull was a breach of contract, the remedy of the buyers was against the shipowners under the bill of lading which had passed from the sellers to the buyers. There was, however, no breach of contract, for the contract contained no stipulation as the time within which the delivery was to be completed, and as between the buyers and sellers the ship performed the voyage contracted for. Secondly, the award is bad unless the buyers can show that they had a right to reject the goods. After accepting a part of the goods the buyers had no right to reject the balance. It was one entire contract : *Jackson v. Rotax Motor and Cycle Co.* (1) The buyers' remedy, if any, was damages.

Bevan K.C. and van den Berg for the buyers. The contract was for a sale of goods to be shipped in Alexandria and delivered in London. As soon as the ship arrived in London the contract voyage was completed and it became the duty of the sellers to deliver the whole of the goods to the buyers within a reasonable time after the arrival of the ship in London. If the sellers' contention is right the ship might, after a portion of the goods had been delivered, have left London on another voyage, returning to London twelve months later, and the buyers would have had no remedy. The delivery contemplated by the contract was a continuous delivery. The buyers were entitled to reject the balance of the goods. They had not in law accepted the portion actually delivered, for they had only received it in the belief that there would be a continuous delivery of the whole quantity. Receipt of a portion of the goods without acceptance does not bind the buyers to accept the balance : *Bowes v. Shand.* (2) [*Sargant v. East Asiatic Co.* (3) was also referred to.]

Jowitt in reply. The buyers could only reject the balance after returning the portion which they had received. They cannot affirm the contract as to one part of the goods and reject it as to the rest.

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(1) [1910] 2 K. B. 937.

(2) (1877) 2 App. Cas. 455.

(3) (1915) 21 Com. Cas. 344.

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July 8. BAILHACHE J. read the following judgment :
In this case the sellers, by two contracts of sale and in the events which happened, bound themselves to the buyers to deliver in London, ex the steamship *Port Inglis*, to the buyers' craft alongside, two separate parcels of cottonseed, one of 176 tons and the other of 400 tons. The buyers on their part had to pay for these parcels against shipping documents and to send craft to receive the goods. The buyers fulfilled both these obligations and received from the *Port Inglis* some fifteen tons of one parcel and twenty-two tons of the other. When these had been delivered it was discovered that the rest of the seed was lying under cargo for Hull, and the *Port Inglis* stopped delivery and left for that port, promising to return and deliver the rest of the seed. She returned in about a fortnight's time and the seed was tendered to the buyers, but the buyers had meantime informed the sellers that they regarded the departure of the *Port Inglis* with the remainder of the seed on board as a failure to deliver and a breach of contract. They kept so much of the seed as had been delivered to them and demanded repayment of so much of the contract price as represented the seed undelivered.

The umpire has decided in the buyers' favour and I am asked to say whether he was right. Everything depends upon whether the departure of the *Port Inglis* for Hull with the greater part of both parcels of seed on board was a failure to deliver, notwithstanding the promise to return and complete delivery. Both contracts between the parties are in the same terms and neither has any express provision on the subject. In my opinion, the buyer under such a contract, and where each parcel of goods is indivisible, as here, has the right to have delivery on the arrival of the steamship, not necessarily immediately or continuously ; he must take his turn or the goods may be so stowed that other goods have to be discharged before the whole of the buyers' parcel can be got out. To such delays and others which may occur in the course of unloading the buyer must submit, but in the absence of any stipulation to the contrary the buyer, being ready with his craft, is entitled to delivery of the whole of an indivisible

parcel of goods sold to him for delivery from a vessel which has begun delivery to him before she leaves the port to deliver goods elsewhere. If this is so the rest of the case is covered by s. 30 of the Sale of Goods Act, and the buyer can either reject the whole of the goods, including those actually delivered, in which case he can recover the whole of his money; or he may keep the goods actually delivered and reject the rest, in which case he must pay for the goods kept at the contract price, and he can recover the price paid for the undelivered portion: see *Devaux v. Conolly*. (1) I think that the award is right.

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Appeal dismissed.

Solicitors for sellers: *Thomas Cooper & Co.*

Solicitors for buyers: *Waltons & Co.*

F. O. R.

MILLETT v. VAN HECK AND COMPANY.

Sale of Goods—Contract for Delivery at fixed Time—Delivery within reasonable Time after future Date—Anticipatory Breach—Measure of Damages—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51, sub-s. 3. 1920 July 21, 22.

By s. 51, sub-s. 3, of the Sale of Goods Act, 1893, "Where there is an available market for the goods in question, the measure of damages [for non-delivery] is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver":—

Held, that when a contract provides for delivery within a reasonable time, or within a reasonable time after a future date, it is not a contract for delivery at a fixed time within the meaning of the section.

The rule in s. 51, sub-s. 3, of the Sale of Goods Act, that if no time for delivery of the goods is fixed, then the measure of damage is to be ascertained by the difference between the contract price and the market or current price of the goods at the time of the refusal to deliver, does not apply to a case where the breach is an anticipatory breach.

APPEAL from a decision of the Official Referee.

The plaintiff carried on business as a cotton waste merchant at Rochdale, and the defendants carried on business as cotton

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spinners and manufacturers in Holland. By six contracts made between January 10 and August 23, 1916, the plaintiff agreed to sell to the defendant for export to Holland a quantity of cotton waste. The contracts provided that shipment of the cotton waste should be subject to Government permission to export.

When the contracts were entered into cotton waste could not be exported without the licence of His Majesty's Government, but at those dates and for a long time previously licences for export to neutrals were regularly and freely granted, and the plaintiff duly exported to the defendants large quantities of cotton waste under the contracts. In January, 1917, however, the export of cotton waste was absolutely prohibited by the Government, and licences for the export thereof to Holland could not be obtained, and the plaintiff was thereby prevented from exporting and delivering the balance of cotton waste under the contracts.

A correspondence then took place between the parties. On April 4, 1917, the defendants wrote to the plaintiff: "We are now in a position to revert to your recent communication re prohibition of export by the British Government. Of course it is understood that the contracts existing between us are kept on until such times as delivery can be made."

The plaintiff replied on April 16: "We are in receipt of your letter of April 4 re prohibition of cotton waste, and we are certainly agreeable to deliver the existing contracts between us as soon as ever possible. There seems to be no likelihood of shipping at present, owing to the material being required for munition purposes here. However, you can rest assured that the goods will be sent forward as soon as the embargo is lifted."

The defendants wrote to the plaintiff on May 9: "We are in receipt of your favour of the 16th ult., from which we learn that you are certainly agreeable to deliver the existing contracts between us as soon as ever possible. Useless to say that we cannot manage keeping our mills running owing to the non-arrival of shipments from England. We sincerely

hope however that the British Government will remove the embargo put on cotton waste ere long so that you will be able again to resume shipments to our firm."

On May 22 the plaintiff wrote to the defendants: "We are in receipt of your letter of May '9, contents of which we have noted, and as previously stated we are quite agreeable to deliver the existing contracts as soon as ever we receive shipping permission."

On June 27 the defendants wrote to the plaintiff: "We have pleasure in handing you under this cover certification of extension of the term of shipment of the following N. O. T. authorisations No. 157,602 and No. 157,601, with which please do the needful. Useless to say that our stocks are completely exhausted, and we, therefore, are anxiously awaiting your Government's permissions to you to resume shipment of our cotton waste."

The plaintiff replied on July 17: "We are in receipt of your letter of June 27 . . . and you can rest assured that as soon as the embargo is taken off we shall get some deliveries forward to you."

On August 8, 1918, the plaintiff wrote to the defendants refusing to be any longer bound by his contract to make deliveries to the defendants.

The defendants on October 17, 1918, accepted the plaintiff's repudiation of the contract.

The prohibition of the export of cotton waste was removed on January 16, 1919.

On January 8, 1919, the plaintiff commenced these proceedings, in which he alleged that the continued stoppage of the export of cotton waste operated so as to frustrate and defeat the commercial objects of the parties in entering into the contracts and rendered fulfilment thereof impossible, and he claimed a declaration that the six contracts in so far as they were unperformed were dissolved and determined, or alternatively that the plaintiff was entitled to determine the same.

The defendants by their defence alleged that the plaintiff had entered into a contract to deliver the balance of the goods

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after the removal of the embargo, and they counterclaimed for a declaration that they were entitled to recover from the plaintiff damages for his repudiation of that contract.

Greer J. held that the result of the correspondence between the parties was that they thereby modified their rights under the six contracts : The parties entered into a new and binding agreement that the deliveries under the six contracts should be suspended until the removal of the embargo, the plaintiff being willing to deliver and the defendants being willing to accept delivery of the balance of the goods after the embargo had been removed ; and also that both parties contemplated at the time of entering into that arrangement that the removal of the embargo would only take place after the expiration of a substantial period of time. He accordingly refused to make the declaration which the plaintiff asked for, but he made a declaration that the defendants were entitled to recover damages for the plaintiff's repudiation of his contract, the damages to be assessed by an Official Referee.

That decision was affirmed by the Court of Appeal.

If the damages were assessed with reference to the market price of the goods on August 8, 1918, the date when the plaintiff repudiated the contract, there would be a large sum due to the defendants. On the other hand if the damages were assessed with regard to the market price of the goods on January 16, 1919, the date when the embargo was removed, they would, owing to a fall in the market, be merely nominal.

The Official Referee held that a date was fixed for the delivery of the goods—namely, the date of the removal of the embargo—but that a reasonable time thereafter must be allowed for the delivery of the goods ; that the goods could not have been shipped until March, 1919, and that even then the whole of the goods could not have been delivered at once ; that the defendants were entitled to recover damages for the plaintiff's breach of contract, notwithstanding that it was an anticipatory breach ; but that the defendants by not suing at once but waiting until the plaintiff brought his action and then setting up their claim by way of counterclaim kept the contract open for the benefit of both parties until

the time for performance arrived ; and that the proper way to assess the damages was to take the market price of the goods from March, 1919, onwards, and ascertain from time to time what was the difference between the contract price and the market prices at the time when the goods could in the ordinary course of business have been delivered.

Both the plaintiff and the defendants appealed.

Cyril Atkinson K.C. and *Cockshutt* for the defendants. The parties entered into a new contract by which the deliveries under the six contracts were suspended until the removal of the embargo rendered performance of the contracts possible. When the embargo was removed the plaintiff was to make delivery of the balance of the goods as soon as reasonably possible. The date when the embargo would be removed was uncertain, and therefore it was a contract for delivery within a reasonable time of an uncertain date or for delivery within a reasonable time of a future date. A contract in that form is not a contract for delivery at a fixed date, and under s. 51, sub-s. 3, the damages to which the defendants are entitled must therefore be ascertained at the time of the plaintiff's repudiation of the contract on August 8, 1918. Where a party to a contract commits an anticipatory breach of the contract the measure of damages is the same whether the other party accepts the repudiation and sues at once or holds the party in default to his contract and waits till the time fixed for performance of the contract before commencing any proceedings. No time was fixed for delivery under the original six contracts, as licences had to be obtained before delivery could take place. By the agreement the deliveries were suspended till after the embargo was removed, but no time was thereby fixed at which the deliveries were to take place. In *Melachrino v. Nicholl* (1), where the contract was for the sale of a quantity of cotton seed to be shipped by the steamship *Asaos* from Alexandria expected ready to load during December, 1916, payment to be made in London within fourteen days from the seed being ready for delivery,

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Bailhache J. held that it was not a contract where the time for delivery was not fixed. "The time [for delivery] was not certain but it was fixed by reference to the happening of an event—namely, the arrival of the *Asaos* in the United Kingdom." Bailhache J. said "that when s. 51 speaks of no time being fixed for delivery it refers to those contracts in which no mention of time is made and which therefore are to be performed within the indefinite period known as a reasonable time under the circumstances." As there was no fixed time for delivery the damages must be assessed as at the time when the plaintiff repudiated the contract and not at the date when the defendants accepted that repudiation: see *Mayne on Damages*, 9th ed., p. 176.

Sylvain Mayer K.C. and *C.F. Lowenthal* for the plaintiff. The new contract which the parties made by the correspondence was that the sellers should deliver the balance of the goods after the embargo was removed, but the sellers must be taken to have a reasonable time for making delivery after the embargo was removed. A contract for delivery within a reasonable time of a fixed date is a contract for delivery at a fixed date within s. 51, sub-s. 3, of the Sale of Goods Act. The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, was thus stated by Cockburn C.J. in *Frost v. Knight* (1): "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation

(1) (1872) L. R. 7 Ex. 111, 112.

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of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." Brett J. pointed out in *Roper v. Johnson* (1) that in the case of a breach of a contract by the refusal of the seller before the day fixed for performance to deliver the goods the damages must be estimated "by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach." The measure of damages in the case of an anticipatory breach is not different from that in the case of a breach at the time of performance. Bailhache J. in *Melachrino v. Nicholl* (2) said that "the true rule is that where there is an anticipatory breach by a seller to deliver goods for which there is a market at a fixed date the buyer without buying against the seller may bring his action at once, but that if he does so his damages must be assessed with reference to the market price of the goods at the time when they ought to have been delivered under the contract." He had previously pointed out that where "there is an anticipatory breach but no buying against the defaulting seller, and the price falls below the contract price between the date of the anticipatory breach and the date when the goods ought to have been delivered, the adoption of the date of the anticipatory breach as the date at which the market price ought to be taken would put the buyer in a better position than if his contract had been duly performed." In the present case the defendants did not buy against the defaulting seller, but waited until he brought his action before making any claim for damages for non-delivery. Delivery of the balance of the goods was not to be made until the embargo was removed and therefore damages ought not to be assessed at a date before the time for performance. After the removal of the embargo it was the duty of the seller to deliver within

(1) (1873) L. R. 8 C. P. 167, 180.

(2) [1920] 1 K. B. 699, 698.

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a reasonable time, but as the seller had previously refused to deliver he could not set up that a reasonable time had not elapsed. This is either a case in which the time for delivery is fixed or one in which the time for delivery is partly fixed; in either event the last paragraph of s. 51, sub-s. 3, dealing with the case when the time for delivery is not fixed, does not apply.

Cyril Atkinson K.C. replied.

BRAY J. read the following judgment. It is agreed by both parties that we should lay down the principles on which the Official Referee should act in assessing damages without reference to the two notices of appeal.

The first question we had to decide was, what was the contract for the breach of which damages are claimed? We hold that it was a contract to suspend deliveries until a reasonable time had elapsed after the removal of the embargo, for deliveries under the original six contracts to be resumed, and that the reasonable time should be as soon as reasonably possible having regard to the position of both parties. After the expiration of that reasonable time deliveries should be resumed and continued in conformity with the original contracts.

The next question was whether the new contract was a contract for delivery within a fixed time or not. It is not easy to say what is the meaning of the words "fixed time" in s. 51 of the Sale of Goods Act, 1893. In our opinion when a contract provides for delivery within a reasonable time, it is not a contract for delivery at a fixed time, and this is so even if the contract is for delivery within a reasonable time after some future date. We therefore hold that this new contract was not a contract for delivery at a fixed time.

The next point was whether this case fell within the rule mentioned in the last two lines of s. 51, sub-s. 3. We hold that this rule cannot apply to this case. It does not apply to a case where the breach is an anticipatory breach. We hold that there is no specific rule in s. 51 within which the present case falls, except the rule in sub-s. 2, and that this

case must be decided according to that rule, but with the light thrown upon it by sub-s. 3.

We hold that *prima facie* the damages should be the difference in price between the contract price and the price at which the goods should have been delivered according to the terms of the new contract as decided by us. Deliveries will have to be made at different times, and this rule must apply to each delivery. This is however only a *prima facie* rule. If it can be shown by either party that the reasonable course for minimizing the damages would be otherwise this *prima facie* rule should not be applied. For instance, if it could be shown that the reasonable course to be pursued would be for the buyer to enter into a forward contract on the date when the repudiation was accepted, the damages should be assessed according to the difference between that price in that forward delivery and the contract price, and so, also, if it could be shown that the reasonable course to be pursued would have been to enter into a forward contract at some later date.

It has been agreed that the date of the acceptance of the repudiation of the contract was October 17, 1918.

SANKEY J. I entirely agree with the judgment delivered by my brother, which is the judgment of the Court.

Solicitors for plaintiff: *Rawle, Johnstone & Co., for H. Whittingham, Bolton.*

Solicitors for defendants: *Cunliffe, Blake & Mossman, for Goulty & Goodfellow, Manchester.*

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[IN THE COURT OF APPEAL.]

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June 8, 9;

July 26.

MEADOWS *v.* ELLERMAN LINES, LIMITED.

Employer and Workman—Compensation—Accident—Industrial Disease—Anthrax—Due to Nature of Employment—Handling Hides—No Evidence of actual Handling—Onus of Proof—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 8, sub-s. 1, 2; Sch. III.

By s. 8, sub-s. 2, of the Workmen's Compensation Act, 1906: "If the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the Third Schedule to this Act, and the disease contracted is the disease in the first column of that Schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary":—

Held, that the words "employed in any process mentioned in the second column of the Third Schedule" related to the general nature of the workman's services.

Where, therefore, a workman, employed as a foreman of a gang of labourers who were engaged in unloading hides and skins from a ship, died from anthrax, one of the diseases mentioned in the schedule, it was held that the onus of proving that his death was due to the nature of his employment was not shifted to the dependants of the deceased workman notwithstanding that there was no direct evidence to show that he had himself in fact handled any of the hides or skins, and that as the employers had failed to prove that the disablement was not due to the nature of his employment his dependants were entitled to have an award made in their favour.

APPEAL from an award of the judge of the Liverpool County Court, sitting as an arbitrator under the Workmen's Compensation Act, 1906.

On November 10, 1919, the workman, Robert Meadows, died of anthrax, a scheduled disease. For more than twelve months previously he had been employed by the respondents as foreman of a gang of dock labourers who were employed in loading and unloading ships at their quay at the Liverpool Docks.

The applicants, who were the widow and the two infant children of the deceased workman, claimed compensation for his death, alleging that the disease from which he died was

due to the nature of the employment in which he was engaged of handling merchandise, including wool, hair, bristles, hides and skins.

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The respondents denied their liability to pay compensation on the grounds that the death of the deceased workman was not in fact caused by the disease alleged ; that the disease was not contracted whilst the workman was in their employ ; that it was not due to the nature of the employment in which he was employed by the respondents ; that the deceased workman was not engaged in handling merchandise as specified in the applicants' particulars, and that his death was not caused or contributed to by an accident arising out of and in the course of his employment.

It appeared from the evidence of the wife of the deceased workman that on November 6 he had a small pimple on his chin ; that on the next day his neck was swollen, that on the following day he went to work and was sent home on an ambulance and died on November 10. There was no direct evidence that the deceased had actually handled any hides in the course of his duty, but there was evidence of another foreman in the employment of the respondents that he (the foreman) would often pick up a sling himself, and that probably every sling he handled had been used for hides. As foreman he would often handle hides without gloves. He stated that the respondents' sheds were full of hides, and that often they had to remove them to make a gangway. It would be seldom in the course of the year that there would not be hides in the shed. To go to work the deceased would have to pass the hides in the shed and sometimes to move them to make a gangway. In cross-examination he stated that the *Trentino* was loading cargo from November 3 at Alexandra No. 1 Dock, and that the deceased was working on that ship from November 3 ; that on October 30 and 31 and November 1 he was working on the *Lesseps* on which he believed there were hides, and that on October 15 he was working on the *Como* in charge of a gang, and that there were hides on that ship. He further stated that as a rule a foreman in charge of a gang was not supposed to handle the hides, but would very often have

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to do so to help on the work. Another witness stated that he worked in the same gang as the deceased on November 8, the last day on which he was at work. They were loading general cargo for Alexandria. He worked with him on the *Lesseps*. They had two bales of black skins in No. 2 hold. There were hides in the shed during the week, through which the deceased had to pass. There were no hides on the *Trentino*.

Professor Beattie, the medical witness, in the course of his evidence stated that the first symptom of anthrax was a pimple; that usually the pimple would appear in 24 or 48 hours after infection; that the most common and usual source of infection in this country was from hides and wool, and that this was therefore a probable cause of infection.

The county court judge made an award in favour of the respondents on the ground that although evidence was given that hides were frequently on the quay and from time to time handled on the ships there was no actual proof that the deceased ever in fact handled them. There was no doubt some evidence that he might have done so or might have handled slings. That evidence did not seem to him to amount to more than conjecture. He did not think that the onus was shifted on to the respondents to prove that the deceased did not in fact handle hides and did not in fact sustain the accident of infection while in the course of his employment by some act arising out of the employment. Although the evidence pointed to a possibility or even probability that the accident arose out of and in the course of the employment it fell short of anything from which he could draw the inference with reasonable certainty that it did so. If the onus had been shifted there would have been a sufficient degree of probability to enable him to say that the applicants' case had been made out.

The applicants appealed.

G. Caradoc Rees (*A. M. Langdon K.C.* with him) for the applicants. Anthrax being one of the industrial diseases mentioned in Sch. III. to the Workmen's Compensation Act,

1906, the disease is by s. 8, sub-s. 2, to be deemed to have been due to the nature of the employment, unless the employer proves the contrary. It is not necessary in order to bring the present case within the purview of the sub-section for the applicants to prove that the deceased workman in fact handled any of the articles described in the second column of Sch. III. It is sufficient for them to prove that he was employed in a process which involved the handling of hides and skins. There is no authority on the point, and the solution of the question depends on an analysis of the words of the Act. By s. 8, sub-s. 1, proof must be given that the disease is due to the nature of the employment—i.e., the disease must be caused in whole or in part, not by the actual work done by the workman but by the character of the work he is by his contract of service called upon to do.

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Next, the onus of proof shifts under sub-s. 2 as soon as it is established that at or immediately before the date of his disablement the workman was employed in the process of "handling of wool, hair, bristles, hides and skins." The words are not "was handling" or even "was engaged in handling," but are "was employed in the process of handling." Those words are sufficiently wide to cover the case of a workman who is proved to have taken part in the process by virtue of his employment but is not proved to have handled a single hide or skin. There is here sufficient evidence to prove that the deceased workman was employed in a process of handling cargo containing skins and hides, although there is none that he actually personally touched a skin or hide.

Innes or Grant v. Kynoch (1) was a case of accident and not of an industrial disease and has therefore no bearing on the present case.

They also referred to *Wilson v. Blyth Shipbuilding and Dry Docks Co.* (2)

Greaves Lord K.C. and *J. H. Layton* for the respondents. The applicants have failed to prove that the deceased workman was employed by the respondents in the process of handling hides at or immediately before the date of the disablement. In

(1) [1919] A. C. 765. (2) [1919] 1 K. B. 324.

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1920 The county court judge had all the evidence before him, and

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came to the conclusion that the deceased workman was not engaged in any sense in handling hides.

[LORD STERNDALÉ M.R. Is not the foreman of a gang of men who are handling skins and who may on an emergency touch a skin a man engaged in the process of handling skins ?]

It appears from the evidence that there were no hides on the *Trentino*. From October 1 to 5 the workman was working on that ship and the pimple developed on October 6. The evidence therefore is that he was not working on any ship on which there were hides after October 1.

Caradoc Rees in reply. The point is, was the deceased workman at or immediately before the date of the disablement or suspension employed in the process of handling hides? The county court judge never directed his mind to this point. What he did direct his mind to was whether the deceased workman was employed in handling hides. He limited the process of handling to physical handling which was only part of the process of handling. He therefore misdirected himself. There was evidence of handling in the warehouse immediately before the disablement. The handling did not cease with the unloading with slings.

Cur. adv. vult.

July 26. The judgment of the Court (Lord Sterndale M.R., Atkin and Younger L.J.J.) was delivered by

ATKIN L.J. In this case the deceased workman was the foreman of a gang of dock labourers employed by the respondents in loading and unloading their ships in the Liverpool Docks. On November 10, 1919, he died of anthrax, which is one of the diseases named in Sch. III. to the Workmen's Compensation Act, 1906. The applicants, his dependants, claim compensation on the ground that his death was due to the nature of the employment in which he was employed within the twelve months previous to his death.

The question that rises upon this appeal is, whether the applicants are entitled to the benefit of the onus of proof conferred by s. 8, sub-s. 2, of the Act. If they are, the learned county court judge has held that the employers have not rebutted the presumption that the disease was due to the nature of the employment. If they are not, he has held that the applicants have not discharged the onus which is upon them of proving that the disease was due to the nature of the employment. The learned county court judge came to the conclusion that the applicants were not within sub-s. 2, and he therefore made his award in favour of the respondents.

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The question turns upon the construction of sub-s. 2: "If the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the Third Schedule to this Act, and the disease contracted is the disease in the first column of that Schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary." What is meant by "was employed in any process mentioned in the second column of the Third Schedule"? The words "employ" and "employment" are capable of two meanings which are apt to cause confusion. They may relate to the general nature of a workman's employment, or they may be confined to the particular work or job, which he is doing under his contract of service at any particular moment of time. One must judge their true meaning in any particular case by the context. In this sub-section I am of opinion that they relate to the general nature of the workman's service. The scheme of the Act seems to be that if the workman is disabled by one of the diseases mentioned in the schedule, and can show that the disease was due to the nature of his employment, he can recover as for an amount arising out of or in the course of his employment. To discharge that onus, apart from the sub-section, it would not be sufficient to prove that the disease is one generally associated with the nature of the employment;

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it would be necessary to show the causal connection, that the disease was due to the employment. But in the case of certain diseases which are more closely associated with particular industries the Legislature has thought fit to enact that, if a workman who is employed in that industry suffers from the particular associated disease, he is relieved in the first instance from giving further proof of particular facts tending to show that the industry caused the disease in him. The inference is complete unless the employer can negative the connection. No doubt he may do this by either proving affirmatively that the disease was caused by an indicated independent cause, or by showing that the actual work or job on which the workman was employed was such that within the period of possible infection or origin of the disease the disease could not possibly be due to the nature of the employment. The word used in the third column is a general word, "process." In the schedule to the Act and in the amending orders of July 30, 1913, July 1, 1914, and July 7, 1915, the descriptions of the processes are in many cases in wide terms, including in relation to several diseases "mining." In this particular case the process with which anthrax is associated is described as "handling of wool, hair, bristles, hides, and skins." If then the employment of the deceased workman, used in the wider sense, was the handling of hides and skins, etc., and if the workman was in such employment at or immediately before the disablement, it was unnecessary for the applicants to prove in the first instance that the workman's particular job at or immediately before disablement was handling skins or hides. The Act draws the necessary inference for them unless the employers can rebut it.

On the undisputed facts in this case it appears to me that the workman was employed in the process of handling of hides and skins. His duties necessarily involved his doing so. We have the evidence of some of his particular jobs for a period of a month before his death. From October 9 to 14 he was unloading hides from the *Como*. Gloves were served out to him for his gang for the express purpose of protecting them from infection. On October 30, October 31, and November 1,

he was loading No. 2 hold of the *Lesseps* ; there were two bales of black skins. In No. 1 hold, worked by another gang, there were hides. From November 3 he was loading the *Trentino* with general cargo. But in addition to the particular cargo, the sheds of the Ellerman Line were full of hides ; it was very seldom in the year that there would not be hides in the shed ; and the dock labourers would have to handle the hides to make a gangway or to extricate a case. The duties of handling are not confined to the labourers in the gang ; the foreman would lend a hand. It is, I think, impossible to limit the description of the process " handling hides " to an employment which consists of handling hides and nothing else. On the other hand it would seem illogical to cast the onus upon the employer in cases where the employment is ordinarily innocuous, and handling hides is only a casual incident, and not one of the regular duties of the employment ; or in cases where, though handling hides is one of the regular duties of the employment at varying times or seasons, yet it was not part of the regular duties at or immediately before the disablement. In such cases the workman must be left to prove that the disablement was due to the nature of his employment. But where handling of hides forms part of the regular duties of the employment at or immediately before the disablement, then even though the workman was not engaged on the particular job of handling hides at or immediately before the disablement, the onus is upon the employer. In the present case it was established beyond controversy that the regular duties of the employment at the material period included the duty of handling hides. The workman therefore was employed in the scheduled process, and was in such employment at or immediately before the disablement. It appears to me for the reasons I have given, with great respect to the learned and very careful county court judge, that he was in error in confining his attention to the question whether the actual job of the workman at or immediately before disablement was handling hides ; and that his finding of fact in that respect becomes irrelevant. The applicants were entitled under the sub-section to an award unless the employers negatived the

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 1920 employers failed in this respect the appeal must be allowed
 with costs here and below, and the award made in favour of
 the applicants, and the case be remitted to the county court
 judge to give the necessary directions.

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Appeal allowed.

Solicitors for appellants : *Tippetts for J. W. Wall, Bootle.*

Solicitors for respondents : *Pritchard & Sons for Buckley & Blackwood, Liverpool.*

W. I. C.

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July 28.

REX v. DICKINSON.

Defence of the Realm—Current Coin—Use otherwise than as Currency—Conviction—Forfeiture—"Goods"—Defence of the Realm Regulations, regs. 30 E, 48, 58.

Reg. 58 of the Defence of the Realm Regulations provides that where a person is convicted of an offence against the regulations by a Court of summary jurisdiction "the Court may in addition to any other sentence which may be imposed order that any goods in respect of which the offence has been committed shall be forfeited."

A man was convicted under regs. 30 E and 48 of doing certain acts preparatory to using 1800*l.* in gold otherwise than as currency, and an order was made for the forfeiture of the 1800*l.* :—

Held, that the money was "goods" within the meaning of reg. 58, and that the order for forfeiture had been rightly made.

RULE NISI for certiorari.

On March 5, 1920, Joseph William Chamberlain was convicted at Bow Street Police Court for that he did, in the six months immediately preceding January 14, 1920, unlawfully do and commit certain acts preparatory to the commission of an act prohibited by the Defence of the Realm Regulations, to wit, acts preparatory to using, otherwise than as currency, gold coins which were for the time being current in the United Kingdom, to wit, sovereigns, contrary to regs. 30 E and 48 of the said regulations. (1) Chamberlain was sentenced

(1) Defence of the Realm Regulations, 30 E: "A person shall not

by the late Chief Metropolitan Magistrate to six months' imprisonment in the second division and ordered to pay 100*l.* costs and to forfeit 1800*l.* in gold found in his possession, and in respect of which the offence had been committed. On March 14 Chamberlain died. His executrix subsequently applied for, and obtained, a rule nisi calling upon the magistrate to show cause why a writ of certiorari should not issue to bring up and quash the order for forfeiture upon the ground that the word "goods" in reg. 58 of the Defence of the Realm Regulations (1) does not refer to coin of the realm.

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Travers Humphreys (Vernon Gattie with him) showed cause against the rule. It is admitted that when the word "goods" is used in a statute in conjunction with the words "wares and merchandise" or "chattels," it would not include money: *Rex v. Leigh* (2), *Rex v. Guy* (3); and in some statutes, of which the Sale of Goods Act, 1893, is an example, the word is expressly defined as not to include money; but "the word goods may in a large sense take in money": *John Howard's Case* (4); and when, as in this case, the word is used without any definition or qualification its meaning depends on the context and scope of the enactment in question: *The Noordam* (No. 2), per Lord Sumner. (5)

Having regard to the objects aimed at by the Defence of

melt down, break up, or use otherwise than as currency any gold coin which is for the time being current in the United Kingdom or in any British possession or foreign country; and if any person acts in contravention of this regulation he shall be guilty of a summary offence against these regulations."

48: "Any person who attempts to commit . . . or procures, aids or abets, or does any act preparatory to, the commission of, any act prohibited by these regulations, . . . shall be guilty of an offence against these regulations."

58: "A person convicted of an

offence against these regulations by a court of summary jurisdiction shall be liable to be sentenced to imprisonment with or without hard labour for a term not exceeding six months or to a fine not exceeding 100*l.*, or to both such imprisonment and fine, and the court may, in addition to any other sentence which may be imposed, order that any goods in respect of which the offence has been committed shall be forfeited."

(2) (1764) 1 Leach, 52.

(3) (1782) 1 Leach, 241.

(4) (1751) Foster's C. C. 77.

(5) [1920] A. C. 904, 909.

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the Realm Regulations, the word "goods" in reg. 58 should be given the widest possible meaning, and it should be construed to include every article in respect of which an offence can be committed under the regulations. The regulations deal with many things, for example false passports, which would not ordinarily be called goods. *Moss v. Hancock* (1) shows that a coin forming part of the ordinary currency may cease to be current coin if it is used for another purpose. The intention was to melt down these sovereigns, and if they had in fact been melted down they would clearly have been goods, and they were equally goods when in the possession of a man who had done an act preparatory to using them otherwise than as current coin.

St. John Hutchinson in support of the rule. *Prima facie*, the word "goods" does not include money: *Reg. v. Radley* (2); and in construing a penal enactment a word should not be given a meaning more extensive than that which it ordinarily bears. Throughout the Larceny Acts the word "money" is used in contradistinction to "goods." The object of reg. 58 is not punishment but the protection of the State, and it therefore authorizes the forfeiture of any things which may be a danger to the State. Money does not come within that category. So long as the sovereigns had not been melted down they remained current coins of the realm, and not goods. If the coins were goods no offence had been committed, for the offence presupposes that the person charged had in his possession gold coins which were part of the currency.

BRAY J. In this case a man named Chamberlain, who is now dead, was convicted under regs. 30 E and 48 of the Defence of the Realm Regulations of committing certain acts preparatory to using 1800*l.* in gold otherwise than as currency. He was sentenced to six months' imprisonment and fined 100*l.* and an order was made under reg. 58 for the forfeiture of the 1800*l.* which had been found in his possession. A rule for a writ of certiorari to quash that order was obtained

(1) [1899] 2 Q. B. 111.

(2) (1849) 1 Den. 450.

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on the ground that the money was not "goods" within the meaning of reg. 58. [The learned judge read reg. 58.] If the money is goods there is no doubt that the offence was committed in respect of those goods and that they are therefore liable to be forfeited. The fact that the man was convicted of an offence under the combined effect of regs. 30 E and 48 shows that he was committing an act preparatory to using these sovereigns otherwise than as currency, and the authorities show that although the expressions "goods, wares and merchandise" or "goods and chattels" do not include money, yet the word "goods" by itself may in some circumstances include current coins of the realm. In *Moss v. Hancock* (1) Darling J. said: "It is plain that the mere fact that the stolen gold piece was money would not render it unfit for the application to it of an order for restitution. The true question seems to me to be whether by the manner of dealing with it which the thief adopted the gold piece passed in currency. . . . I ask myself was this gold piece passed on in its character as coin of currency, or was it rather the subject of a sale as an article of vertu." In the present case it was intended to put these sovereigns into a crucible and melt them down, and it is obvious that when once they were in the crucible they would have ceased to be current coin. In my opinion they equally ceased to be current coin and became goods as soon as an act was committed which was preparatory to their being placed in the crucible, for they were then being dealt with as goods and with the intention of their being used as goods. In my opinion the order of forfeiture was rightly made and the rule must, therefore, be discharged.

SANKEY J. I am of the same opinion. I respectfully agree with and adopt the observations of Lord Sumner in *The Noordam* (No. 2). (2) The word "goods" is undoubtedly a word of very general and quite indefinite meaning. In many statutes it is defined by the inclusion or exclusion of other words, a list of which will be found in Stroud's Judicial

(1) [1899] 2 Q. B. 116.

(2) [1920] A. C. 904.

1920 Dictionary. When the word stands alone without definition
 REX its meaning must be ascertained, as was said by Lord Sumner
 v. in *The Noordam* (No. 2) (1), by "the character and scope"
 DICKINSON. of the enactment in which the word is used. I think that
 Sankey J. the word "goods" in reg. 58 covers these sovereigns which
 were being used as goods and not as current coin.

SALTER J. I agree. It is not necessary to decide whether
 the word "goods" in reg. 58 would cover current coin which
 was being used and treated as such, for in this case the man was
 convicted of doing certain acts preparatory to using the coins
 otherwise than as currency. In these circumstances there is
 no doubt that the coins were goods.

Rule discharged.

Solicitors for applicant : *John T. Lewis & Woods.*

Solicitor for respondent : *Director of Public Prosecutions.*

F. O. R.

1920 [IN THE KING'S BENCH DIVISION AND IN THE COURT OF
 March 3. APPEAL.]

C. A. HILL AND ANOTHER v. KIRSHENSTEIN AND OTHERS.

1920
 June 15. [1919. H. 789.]

*Revenue—Income Tax—Landlord's Property Tax—Tenant's omission to
 deduct from next Rent—Right to deduct from subsequent Rent—Income
 Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 211, sub-s. 2; First Schedule,
 Sch. A, No. VIII., r. 1.*

A tenant who pays a sum in respect of landlord's property tax and
 omits to deduct it from his next payment of rent has no right to deduct
 it subsequently.

ACTION tried by Darling J. without a jury.

By a lease dated September 4, 1897, the predecessors in
 title of the plaintiffs, G. W. Hill and W. H. Woollven, let to
 the defendants, Aaron Kirshenstein and others, trading

(1) [1920] A. C. 909.

as Chissick & Kirshenstein, boot and shoe manufacturers, premises at Mile End, at the yearly rent of 40*l.* payable quarterly.

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On April 15, 1919, the plaintiffs brought the present action against the defendants claiming 33*l.* 12*s.* 4*d.*, being one year's rent of the premises due on March 25, 1919, and one year's fire insurance premium, due under the lease on that date, less landlords' property tax under Sch. A for one year.

The defendants in their defence and counterclaim stated by way of defence (para. 1) that they were not indebted to the plaintiffs in the sum claimed or at all ; (para. 2) that from the year 1901 they had made payments on account of income tax under Sch. A for and on behalf of the plaintiffs or their predecessors in title in respect of the premises amounting to 70*l.* 2*s.* 11*d.*, of which payments particulars were given ; and that the plaintiffs had allowed the defendants 9*l.* 10*s.* 2*d.* in respect thereof, but that the plaintiffs or their predecessors in title had failed to discharge or bring into account or to make any allowance in respect of the balance of these payments amounting to 60*l.* 12*s.* 9*d.*, of which particulars were given ; (para. 3) that from any sum due to the plaintiffs on account of rent or insurance in respect of the premises, the defendants were entitled to deduct an equal amount of the said sum of 60*l.* 12*s.* 9*d.* paid by them for income tax ; (para. 4) that alternatively the said sums amounting to 60*l.* 12*s.* 9*d.* were paid by the defendants at the request of the plaintiffs or their predecessors, the request being implied in that the defendants were legally compelled to pay the said sums and the same were paid by them for and on behalf of the plaintiffs or their predecessors ; and that in the further alternative the said sums were paid by the defendants for the use of the plaintiffs or their predecessors ; and (para. 5) that the defendants were authorized and entitled to deduct from or to set off against such sum if any as might be found due to the plaintiffs an equal amount of the said sum of 60*l.* 12*s.* 9*d.* due to the defendants ; and the defendants said by way of counterclaim (para. 6) that they repeated the statements in their defence, and said that they were entitled to recover from the

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plaintiffs the said sum of 60*l.* 12*s.* 9*d.*, or alternatively such lesser sum as might be found due to the defendants after deducting from the sum of 60*l.* 12*s.* 9*d.* such sum if any as might be found due to the plaintiffs.

The plaintiffs in their reply and defence to counterclaim stated by way of reply (para. 1) that they did not admit the defendants' statements in regard to the sums paid by them as income tax; (para. 2) that as regarded the alleged payments down to and including the financial year ending April 5, 1917, none of these sums, if paid by the defendants as alleged, was deducted by the defendants from the first payment thereafter made by the defendants on account of rent for the premises and could not now be deducted from the rent claimed in the action, nor were the plaintiffs liable to bring any of these sums into account or to treat any of these payments as payment pro tanto of rent claimed therein, or to discharge the defendants from payment of the said rent or any part thereof, nor were the defendants entitled or authorized to deduct any of these payments from any rent claimed therein; and (para. 4) that the plaintiffs denied that any of the said sums, if paid by the defendants, was money paid at the request of the plaintiffs or of their predecessors or on behalf or for the use of the plaintiffs or of their predecessors; and by way of defence to the counterclaim the plaintiffs said (para. 6) that they repeated paras. 1 to 5 above; and (para. 7) that as regarded all payments made more than six years before the date of the counterclaim they would rely on the Limitation Act, 1623 (21 James 1, c. 16), s. 3.

The defendants did not dispute the plaintiffs' claim for rent. On behalf of the defendants evidence was given by the defendant Aaron Kirshenstein, who stated that all his dealings from the first had been with the plaintiff G. W. Hill, and that he never knew of the existence of the plaintiffs' predecessor in title; that since 1897 for twenty years he had paid each quarter's rent to Hill by cheque, the cheques being produced; that he had paid the landlord's property tax every year but had lost most of the receipts; and that he (witness) and the other defendants moved from the premises in question in

May, 1918, and that then for the first time their attention was drawn to the fact that the tax had never been deducted from the rent.

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W. Craig Henderson for the plaintiffs. The plaintiffs are entitled to recover the sum which they claim. The defendants do not dispute that one year's rent and insurance of the premises became due from them in March, 1919, and remains unpaid, and the plaintiffs admit that the defendants are entitled to deduct the last annual payment of landlord's property tax made by them. The defendants are not, however, entitled to deduct from or set off against the plaintiffs' claim the amount of any previous payment of landlord's property tax made by them or to recover by way of counterclaim the amount of any previous payment of that tax, for it is well settled that "the person . . . paying the property tax who omits to deduct it from his next payment of rent has no right to deduct it subsequently": per Buckley L.J. in *Beaufort (Duke) v. Inland Revenue Commissioners*. (1) At all events the defendants are barred by the Limitation Act, 1623 (21 James 1, c. 16), s. 3, from recovering by way of counterclaim any payment of the tax which was made more than six years before the date of their counterclaim.

J. P. Eddy for the defendants. The defendants are entitled to deduct from or to set off against the plaintiffs' claim the amount of the payments of landlord's property tax made by them since 1901, or to recover these amounts from the plaintiffs by way of counterclaim. The law as laid down by Buckley L.J. in *Beaufort (Duke) v. Inland Revenue Commissioners* (1) was altered by the Revenue Act, 1911 (1 Geo. 5, c. 2), s. 14, sub-s. 2 (2), which clearly authorized any person liable to pay rent to make a deduction on account of income tax for any year which he had failed to make previously. The Income Tax Act, 1918, has repealed that sub-section, but by s. 211, sub-s. 2 (2), it re-enacts it in substantially the same terms.

(1) [1913] 3 K. B. 48, 58.

(2) Revenue Act, 1911 (1 Geo. 5, c. 2), s. 14: "(2.) Any person liable to pay any rent, interest, or annuity,

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The Limitation Act, 1623, does not bar the statutory right of the defendants to recover by way of counterclaim in respect of payments of the tax made by them more than six years before their counterclaim, because that enactment does not apply to "an action brought on a statute for a statutory debt": Halsbury's Laws of England, vol. xix., pp. 40, 76, tit. "Limitation of Actions," paras. 59 and 127.

W. Craig Henderson in reply. The Act of 1918, First Schedule, Sch. A, No. VIII., rule 1, clearly provides that a tenant who pays landlord's property tax shall be entitled to deduct the sum paid only from his next payment of rent and not from any subsequent payment. If s. 211, sub-s. 2, applies to landlord's property tax it must be read in connection with that rule.

or to make any other annual payment, shall be authorised to make any deduction on account of income tax for any income tax year which he has failed to make previously to the passing of the Act imposing the tax for that year, or to make up any deficiency in any such deduction which has been so made on the occasion of the next payment of the rent, interest, or annuity, or making of the other annual payment after the passing of the Act so imposing the tax, in addition to any other deduction which he may be by law authorised to make, and shall also be entitled, if there is no future payment from which the deduction may be made, to recover the sum which might have been deducted as if it were a debt due from the person as against whom the deduction could originally have been made if the Act imposing income tax for the year had been in force."

[Repealed but re-enacted. See *infra*.]

Income Tax Act, 1918:

Sect. 211, sub-s. 2, is substantially identical in terms with s. 14, sub-s. 2, of the Revenue Act, 1911, set out above.

By s. 238 and the Seventh Schedule

s. 14, sub-s. 2, of the Act of 1911 is repealed.

FIRST SCHEDULE.

Sch. A.

No. VIII.

Rule 1: "A tenant occupier of any lands, tenements, hereditaments or heritages who pays the tax shall be entitled to deduct and retain in respect of the rent payable to the landlord for the time being (all sums allowed by the commissioners being first deducted), an amount representing the rate or rates of tax in force during the period through which the said rent was accruing due for every twenty shillings thereof, the said deduction to be made out of the first payment thereafter made on account of rent, and any receiver on behalf of the Crown or other person receiving the rent shall allow the deduction on receipt of the residue of the rent:

"Provided . . . that a tenant or occupier shall not be entitled to deduct out of the rent any greater sum than the amount of tax charged in respect of such property as aforesaid, and actually paid by him."

DARLING J. In this case the plaintiffs, whose predecessors in title had let premises to the defendants, claim to recover from the latter a sum of upwards of 33*l.*, being one year's rent and insurance of the premises due in March, 1919, less a deduction of the last payment of landlord's property tax. The defendants admit that they have not paid the year's rent. They say, however, by way of defence and counterclaim that every year since 1901 they made a payment on account of landlord's property tax, but omitted to deduct any of these payments from the next payment of rent as the statutes relating to income tax authorized them to do; that the plaintiffs failed to discharge or make allowance for any except the last of these payments; and that the plaintiffs owe them in respect of these payments a sum of over 60*l.* If that sum is owing by the plaintiffs to the defendants it in effect wipes out entirely the plaintiffs' claim and leaves them indebted to the defendants in a sum of about 30*l.*

There can be no doubt that down to the passing of the Revenue Act, 1911, the law was as it was stated to be by Buckley L.J. in *Beaufort (Duke) v. Inland Revenue Commissioners* (1), where he said: "The person . . . paying the property tax who omits to deduct it from his next payment of rent has no right to deduct it subsequently." It is said on behalf of the defendants that the law as there laid down was entirely altered by s. 14, sub-s. 2, of the Act of 1911, which has been repealed by the Income Tax Act, 1918, but re-enacted in almost identical terms as s. 211, sub-s. 2, of the latter Act. [His Lordship read the last-mentioned sub-section.] The language of that sub-section is certainly extraordinarily wide, and at first sight it might not unreasonably be understood to mean that a tenant is entitled to deduct from his rent a sum which he has paid on account of landlord's property tax any number of years previously. If that provision stood alone, it would be hard to resist the defendants' contention. It is to be borne in mind, however, that the statute under consideration is one of the revenue Acts. These Acts are, generally speaking, among the most difficult to construe, and it not

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unfrequently happens that it is impossible to ascertain the true meaning of a provision in one of these Acts except by reading it in connection with the other provisions of the Act. In order to understand s. 211, sub-s. 2, of the Act of 1918, regard must be had also to the First Schedule, Sch. A, No. VIII., rule 1, of that Act. [His Lordship read rule 1.] I think that rule means that a tenant who pays a sum in respect of the tax shall be entitled to deduct it from his first payment of rent thereafter, and that the proviso to the rule means that he shall not be entitled to deduct out of the rent any greater sum than that in respect of the tax. If that be the true meaning of the rule, it would not be consistent with it to give to s. 211, sub-s. 2, the effect which the defendants attribute to it. In my view the Acts of 1911 and 1918 have not altered the rule which existed before the passing of these Acts and was stated by Buckley L.J. in the case to which I have referred. If the Legislature had intended to make so revolutionary a change in the law as is suggested they would have done so in plain and unmistakable terms and not in words which if they were intended to have that effect must be regarded as obscure and ambiguous. I therefore come to the conclusion that a tenant who pays the landlord's property tax and omits to deduct it from his next payment of rent has no right to deduct it subsequently. The defence fails and there will be judgment for the plaintiffs on the claim and on the counterclaim.

*Judgment for plaintiffs on claim
and counterclaim.*

J. R.

The defendants appealed.

June 15. *F. A. Holt* (*J. P. Eddy* with him) for the appellants.

W. Craig Henderson for the respondents.

BANKES L.J. The judgment of Darling J. must be affirmed. The plaintiffs claimed a year's rent due under a lease dated

September 4, 1897, made between the plaintiffs' predecessors in title and the defendants, and a year's fire insurance premium with an allowance for a year's income tax under Sch. A. The total sum claimed is 33*l.* 12*s.* 4*d.* There is a formal denial of indebtedness by the defendants, but their real defence is that they had omitted to deduct income tax from 1900-1 onwards, amounting in all to 60*l.* 12*s.* 9*d.* Of this they claim to set off 33*l.* 12*s.* 4*d.*, and they counterclaim the balance. They relied on s. 14, sub-s. 2, of the Revenue Act, 1911, repeated in almost the same words in s. 211, sub-s. 2, of the Income Tax Act, 1918. The Act of 1918 repealed the existing legislation so far as this case is concerned, but re-enacted the material provisions of the earlier Acts.

The first provision to be referred to is Sch. A, No. IV., r. 9, of the Income Tax Act, 1842, which is in substance repeated in Sch. A, No. VIII., r. 1, of the Act of 1918. It provided that "the occupier of any lands, tenements, hereditaments, or heritages, being tenant of the same, and paying the said duties, shall deduct so much thereof in respect of the rent payable to the landlord for the time being . . . as a rate of . . . for every 20*s.* thereof would by a just proportion amount unto, which deduction shall be made out of the first payment thereafter to be made on account of rent; and . . . all landlords, both mediate and immediate . . . shall allow such deduction upon receipt of the residue of the rent, under the penalty herein contained; and the tenant paying the said assessment shall be acquitted and discharged of so much money as if the same had actually been paid unto the person to or for whom his rent shall have been due and payable. . . ." In other words, payment by the tenant of the amount of tax shall be treated as payment by him of an equivalent amount on account of rent; if he wishes to recoup himself, he must deduct from the payment of rent next ensuing an amount equal to the amount of tax he has paid. It has been decided more than once that if the tenant fails to make the deduction from the next payment of rent, he cannot recoup himself; he has no other means of recovering the amount of the tax paid. It has been argued that s. 14 of the Revenue

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C. A. Act, 1911, repeated in s. 211 of the Income Tax Act, 1918,
1920 has altered the law on this point, and that since 1911 a tenant
HILL who has paid income tax under Sch. A, and omitted to deduct
v. the amount from the next payment of his rent, may now deduct
KIRSHEN- it when he pleases from any future payment of rent. I am
STEIN. unable to accept that interpretation of s. 14, sub-s. 2, of
Banks L.J. the Act of 1911. Even if the words could be construed so
as to convey that meaning it cannot have been the meaning
intended by the Legislature which has deliberately re-enacted
Sch. A, No. IV., r. 9, of the Act of 1842, as it has done in
Sch. A, No. VIII., r. 1, of the Act of 1918. Mr. Craig
Henderson has shown that there were good reasons for
enacting s. 14, sub-s. 2, of the Act of 1911; but it is not
necessary to have recourse to those considerations in order
to construe the sub-section, because its language is plain;
it provides that any person liable to pay any rent shall be
authorized to make any deduction which he has failed to
make before the passing of the Act imposing the tax for
the year "on the occasion of the next payment of the rent
. . . after the passing of the Act so imposing the tax." It
goes on to provide that if there is no future payment from
which the deduction may be made, the sum which might
have been deducted may be recovered as if it were a debt.
But here there were future payments year after year from
which, for aught that appears to the contrary, the deductions
could have been made. The appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. The whole
question turns on the construction of s. 211 of the Act of 1918,
which repeats s. 14 of the Act of 1911. It has been argued
that this enactment effected a revolution in this department
of the law. It is admitted on all hands that before it was
passed income tax under Sch. A, paid by a tenant was to be
deducted, if at all, from the payment of rent next after the
payment of the tax, and that it could not be deducted at any
other time; but it is said that these enactments have
authorized deduction from any subsequent payment of rent.
In my view they have no such effect. Before the Act of 1911

there was a period in each year during which no rate of duty was in force ; the old rate had expired and the new rate had not been enacted. During that period some tenants might pay their rent without making any deduction on account of income tax paid. Others might pay it after deducting income tax at the old rate, which might prove to be lower than the rate subsequently imposed. The Act provided that the tenant, who had not made the full deduction from the payment of rent next after payment of the tax, might make the necessary deduction from a subsequent payment of rent ; but it must be made on the occasion of the next payment of rent after the passing of the Act imposing the tax for the year. If there is no future payment from which the deduction may be made, the sum which might be deducted may be recovered as a debt ; but the facts do not raise that point.

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Warrington L.J

SCRUTTON L.J. I agree. Under the provisions of Sch. A to s. 60 of the Income Tax Act, 1842, an occupier who was liable to pay the tax could deduct the amount from the next payment of his rent ; but if he paid the rent in full he could not recover at all from his landlord the amount he might have deducted : *Denby v. Moore* (1) ; *Cumming v. Bedborough*. (2) That set of provisions is reproduced by the Act of 1918. Therefore, it is clear that the Legislature had no intention of interfering with the general provisions of Sch. A. In *North London Property Co. v. Moy* (3) the question arose whether a payment of income tax under Sch. A by a tenant was equivalent to a payment pro tanto of rent, and it was held in the Court of Appeal that it was. Sch. A, No. VIII., r. 2, of the Act of 1918 expressly provides that "a tenant who pays the tax shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid as rent." It was argued that this general enactment has been altered by the special provision contained in s. 211 of the Act of 1918, which reproduces s. 14 of the Revenue Act, 1911. That section deals with two cases. Sub-s. 1

(1) (1817) 1 B. & Al. 123.

(2) (1846) 15 M. & W. 438.

(3) [1918] 2 K. B. 439.

C. A. applies where the tax is to be accounted for to the Crown ;
 1920 sub-s. 2 applies where the tax is not to be accounted for to
 HILL the Crown. Both sub-sections are confined to very special
 v. emergencies where deductions may have been made before
 KIRSHEN- the Act imposing the rate of duty was in force. If, when a
 STEIN. belated Act is passed, it appears that less than the proper
 Scrutton L.J. amount was deducted, the balance may be deducted, but only
 from the first payment of rent after the passing of the Act.
 It is clear that this provision, enacted for the remedy of and
 expressly confined to one small grievance, was never intended
 to alter the general provisions of Sch. A.

Appeal dismissed.

Solicitors for appellants : *Roberts & Co.*

Solicitors for respondents : *Neve, Beck & Kirby.*

W. H. G.

1920
 July 27.

KINGS, APPELLANT v. MERRIS, RESPONDENT.

Adulteration—Milk—Deficiency of non-fatty Solids—Presumption that Milk not genuine—Sale of Milk Regulations, 1901, s. 2—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 4.

By s. 2 of the Sale of Milk Regulations, 1901, made by the Board of Agriculture under the powers conferred by s. 4 of the Sale of Food and Drugs Act, 1899, it is provided that "where a sample of milk (not being sold as skimmed, or separated, or condensed, milk) contains less than 8·5 per cent. of milk solids other than milk fat, it shall be presumed for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899, until the contrary is proved, that the milk is not genuine, by reason of the abstraction therefrom of milk-solids other than milk fat, or the addition thereto of water."

In a prosecution for selling milk to the prejudice of the purchaser, the public analyst's certificate showed a less percentage of milk solids other than milk fat than that required by the above Regulation :—

Held, that the presumption created by the Regulation can only be rebutted by evidence that the seller has neither added water to the milk nor abstracted anything from it; in other words, that he has sold it in the same condition as it was when it came from the cow.

CASE stated by Worcestershire justices.

The respondent was charged under s. 6 of the Sale of Food

and Drugs Act, 1875, with having sold to the prejudice of the appellant, milk not of the nature, substance and quality demanded.

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On February 2, 1920, the appellant purchased from the respondent, a retail milk dealer who purchased his milk from three different farmers, a pint of milk for the purpose of having it analysed. A sample was duly analysed, and the public analyst certified as follows : “ I am of opinion that the said sample contained the parts as under :—

Fat	3·60 parts
Non-fatty solids .. .	7·95 parts
Water	88·45 parts

“ The above is deficient in non-fatty solids to the extent of ·64 per cent. This opinion is based upon the facts that the sample contained 7·95 per cent. of non-fatty solids, whereas genuine milk should contain not less than 8·5 per cent.

“ OBSERVATIONS.

“ No change had taken place in the constitution of the article that would interfere with the analysis.”

A copy of this certificate was served on the respondent, and the public analyst was called by the appellant in support of his certificate.

No evidence was given on behalf of the respondent to show that the milk was in the same condition when sold as it was when it came from the cows ; nor was any analyst’s certificate put in evidence on his behalf.

Para. (j) of the case was as follows : “ For the respondent, Frank Harris Allcock, engaged for forty-five years in business as a pharmaceutical chemist at Birmingham, was called and stated that milk varies considerably without it being interfered with, that there are a dozen causes for creating variability in milk, that it is not possible for non-fatty solids after they leave the cow to become fatty, that the standard of the Board of Agriculture is low, that the district where the respondent carries on his business is a manufacturing one and the pasture is affected by chemicals and will not produce a high-class milk, that accepting the county analyst’s certificate

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as it stood there was nothing to show that the milk was not genuine, and that in his opinion, accepting that certificate, it was genuine."

The appellant contended that in the absence of evidence that the milk submitted to the public analyst was in the same state as it was when it came from the cows, and in the absence of any evidence in support of the theory of the chemist called on behalf of the respondent, the presumption resulting from the public analyst's certificate could not be disregarded, and therefore that the offence charged was proved.

For the respondent it was contended that the purchaser was not prejudiced and that the public analyst's certificate did not on the face of it show that the milk was not genuine milk.

The justices were of opinion that the milk was deficient in non-fatty solids to the extent of .55, but that it had an excess of fatty solids to the extent of .60, that the deficiency in non-fatty solids was infinitesimal, that the milk was better than it might have been by reason of the excess of fatty solids, that upon the evidence before them the milk was genuine milk, that the purchaser obtained an article of food of the nature, substance and quality demanded by him, and that no offence against the statute had been committed.

R. A. Willes for the appellant. By virtue of the provisions of s. 2 of the Sale of Milk Regulations, 1901 (1), made under the authority of s. 4 of the Sale of Food and Drugs Act, 1899, the milk in question must, in view of the terms of the public analyst's certificate, be presumed not to be genuine, and in the absence of proof to the contrary the justices ought to have found that an offence had been committed: *Harrison v. Richards* (2); *Elder v. Dryden*. (3) What is set out in para. (j) of the case is not proof to the contrary. [He was stopped.]

Hilbery for the respondent. The presumption of adulteration created by s. 2 of the Sale of Milk Regulations, 1901, is merely a step in the evidence, and the justices must in each

(1) The Regulation is set out in the headnote.

(2) (1881) 45 J. P. 552.

(3) (1908) 99 L. T. 20.

case consider the question of fact whether the milk is or is not of the nature, substance and quality demanded.

[EARL OF READING C.J. The question is whether there was any evidence to rebut the presumption.]

The facts stated in para. (j) of the case show that there are great variations in the quality of milk, and that although milk may not be of high-class quality, it is, commercially, milk. Those facts constituted some evidence to rebut the presumption, and it is not for this Court to have regard to its weight. [He referred to *Wolfenden v. McCulloch* (1) and *Banks v. Wooller*. (2)]

EARL OF READING C.J. In my opinion this appeal must be allowed, but as we are told that owing to illness the respondent was unable to give evidence, the case will be remitted to the justices for further hearing. As additional evidence may be given it is not desirable to say much, but it is necessary to say this, that, where there is evidence of a deficiency of non-fatty solids—a deficiency, that is, in the percentage required by the Sale of Milk Regulations, 1901—then, unless there is evidence to satisfy the justices that there has been no adulteration by the addition of water or no abstraction of the milk solids, or, in other words, that the milk sold is the milk as it came from the cow, there must inevitably be a conviction. The Sale of Milk Regulations merely create a presumption that the milk in those cases is not genuine, and it is open to the respondent to rebut it and to show that notwithstanding the deficiency in non-fatty solids, he has added nothing to or abstracted nothing from the milk but has sold it in the same condition as it was when it came from the cow. If evidence were given to that effect and the justices believed it, they would be justified in finding that no offence had been committed. Here the difficulty is that as the case stands there is no evidence to rebut the presumption created by the Regulations. The statement in para. (j) of the case is relied upon as some evidence upon which the justices were entitled to come to the conclusion that no offence had been

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(1) (1905) 21 Times L. R. 411.

(2) (1900) 81 L. T. 785.

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committed. I agree that if there was some evidence it is not for us to judge of its weight, that being for the justices. But unless some evidence is given to rebut the presumption—and I do not think the statements in para. (j) constituted evidence rebutting the presumption—the justices had no material upon which they could hold that no offence was committed. If not rebutted, the presumption stands and the public analyst's certificate shows that the milk was not genuine. I have some satisfaction in arriving at this conclusion as it would take much argument to convince me that a purchaser of milk is to be deemed to have asked to be supplied with milk and water, or milk containing less solids than the minimum required by the Sale of Milk Regulations. We cannot distinguish between what has been called commercial milk and genuine milk. The intention of the Sale of Food and Drugs Act, 1899, and the Sale of Milk Regulations made thereunder by the Board of Agriculture, was to protect purchasers, to insure that they should get genuine milk, and to get rid of certain difficulties which would prevent the public being protected.

BRAY J. I am of the same opinion. The evidence given for the respondent was not evidence to the contrary, that is, to rebut the presumption that the milk was not genuine.

SANKEY J. I agree.

Appeal allowed; case remitted.

Solicitors for appellant: *Buller, Cross & Jeffries, Birmingham.*

Solicitors for respondent: *Dennison, Horne & Co., for E. H. Grove, Halesowen.*

J. S. H.

[IN THE COURT OF APPEAL.]

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July 30.

Restraint of Trade—Contract of Service—Severability of Covenant.

The plaintiff carried on business at Kidderminster as a draper, tailor, and general outfitter. By a contract of employment of the defendant by the plaintiff, after reciting that the defendant had requested the plaintiff to employ him as an assistant in his business at an annual salary and commission on turnover above a certain amount in the tailoring department and that the plaintiff was willing to do so only upon his entering into the agreement not to trade in opposition to him thereafter expressed, the defendant agreed that he would not at any time thereafter "either on his own account or on that of any wife of his or in partnership with or as assistant, servant, or agent to any other person, persons or company carry on or be in any way directly or indirectly concerned in any of the following trades or businesses; that is to say, the trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies' or children's outfitter at any place within a radius of ten miles of" Kidderminster. The defendant subsequently set up business as a tailor at Worcester, outside the ten miles' limit, but obtained and executed tailoring orders in Kidderminster. The Divisional Court held that the covenant was wider than was reasonably necessary for the protection of the plaintiff's business, but that it was severable by striking out the enumerated trades except that of a tailor and limiting its operation to the trade or business of a tailor, and granted an injunction restricted to the tailoring trade:—

Held, that the covenant being a single covenant for the protection of the plaintiff's entire business and not several covenants for the protection of his several businesses could not be severed.

Held, also, by Atkin and Younger L.JJ. that even if the covenant could be severed by confining it to the tailoring business it would still be void as being in restraint of competition.

Mason v. Provident Clothing and Supply Co. [1913] A. C. 724 and *Morris v. Saxelby* [1916] 1 A. C. 688 applied.

Per ATKIN and YOUNGER L.JJ. The following points may now be taken to be established by the decisions of the House of Lords in the above cases:—

First. It is the covenantee who has to show that the restraint sought to be imposed upon the covenantor goes no further than is reasonable for the protection of his business.

Secondly. The restraint must be not only in the interests of the covenantee but in the interests of both the contracting parties.

Thirdly. An employer is not entitled by a covenant taken from his employee to protect himself after the employment has ceased against his former servant's competition, although a purchaser of goodwill

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is entitled to protect himself against such competition on the part of his vendor.

Fourthly. Previously accepted rules as to the doctrine of severance require careful application if not entire reconsideration.

Decision of the Divisional Court [1920] 2 K. B. 146 reversed.

APPEAL by the defendant from the judgment of a Divisional Court (Bailhache and Sankey L.JJ.) on appeal from the Kidderminster County Court. (1)

The following statement of facts is taken from the judgment of the Master of the Rolls: "In this case the plaintiff is the proprietor of a business which may be called that of a general outfitter. It contained different departments which are enumerated in an agreement referred to later as follows: 'the trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies' or children's outfitter.' The defendant was employed as a cutter and head of the tailoring department by the plaintiff and his then partner in 1909. His employment was terminable by a month's notice. He was not concerned with any of the other departments but, no doubt, some of the customers in the tailoring department were also customers in some of the others.

"On entering into the service of the firm he executed the following agreement: 'An agreement made between Harry Attwood and Robert Isaac (hereinafter called "the employers") of the one part and James Duncan Lamont (hereinafter called "the assistant") of the other part. Whereas the assistant has requested the employers to employ him as an assistant in their business at Kidderminster at an annual salary commencing at 208*l.* and two and a half per cent. commission on turnover above 1000*l.* in the tailoring department and the employers are only willing to do so upon him entering into the agreement not to trade in opposition with them which is hereinafter expressed. Now this agreement witnesseth that in consideration of the employers employing him in the capacity and at the salary aforesaid the assistant hereby agrees with the employers that he will not

at any time hereafter either on his own account or that of any wife of his or in partnership with or as assistant servant or agent to any other person persons or company carry on or be in any way directly or indirectly concerned in any of the following trades or businesses, that is to say, the trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's ladies' or children's outfitter at any place within a radius of 10 miles of the employers' place of business at Regent House Kidderminster aforesaid And also that this agreement shall not be affected by any change or changes in the constitution of the employers' firm but that in the event of any change or changes therein the right to enforce this agreement shall continue to the surviving or continuing partner or partners and his or their executors administrators or assigns.'

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"In February, 1919, he asked the plaintiff to release him from the agreement or make him a partner, and the plaintiff refused. The defendant then left the plaintiff's service and established himself in business on his own account at Worcester, which is outside the ten-mile radius mentioned in the agreement. There he did business with several of the plaintiff's customers and had personal dealings with them such as taking orders in Kidderminster. The plaintiff then brought an action to restrain him from acting in breach of the agreement and asked for an injunction in the following terms: 'An injunction restraining the defendant from committing any future breach of the said agreement.' The defendant in answer to the claim contended that the agreement was invalid as being in restraint of trade and too wide in its terms to be reasonable.

"It was not seriously contended on behalf of the plaintiff that the agreement could be supported to the full extent of its terms, but it was argued that the restrictions as to the tailoring business could be severed from those relating to the other businesses, and that when so severed it was a reasonable and valid agreement.

"The case was tried in the county court at Worcester, and the learned county court judge decided that the

C. A. contract was not severable and was wider than was reasonably necessary for the protection of the plaintiff's business. 1920 He, therefore, gave judgment for the defendant. On appeal to the Divisional Court that Court held that the contract was severable and that when so severed and confined to the tailoring business it was reasonable and valid. Judgment was therefore given for the plaintiff."

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The plaintiff appealed. The appeal was heard on June 18 and 21, 1920.

Disturnal K.C. and *R. A. Willes* for the appellant. The Divisional Court held that the covenant was severable by striking out all the enumerated trades except that of a tailor, and granted an injunction restricted to the tailoring trade. It is submitted that even if that severance be made the covenant is still unreasonable and void, and that the Court ought not to sever it. The business is a comprehensive one consisting of many departments, and the covenant, as cut down, is wider than what is reasonably required for the plaintiff's protection. It prevents the defendant from being employed in any capacity by a person carrying on a tailor's business within the ten-mile limit. The Court can only sever a covenant of this kind when it contains distinct negative obligations on the part of the covenantor. An agreement merely for the purpose of preventing competition is bad. An agreement with the object of protecting property—i.e., trade secrets or trade connection—may be enforced. If it goes beyond that the agreement is void. The recital in the agreement in this case shows that the express object of the employer is to prevent any competition with him directly or indirectly in this wide area. The defendant could not be engaged in any capacity in a business which had a branch within the radius. Treating it as a tailor's business alone it prevents any form of competition and that is enough to vitiate it. The law is well settled by *Mason v. Provident Clothing and Supply Co.* (1) and *Morris v. Saxelby.* (2)

With regard to the severance of a covenant "that ought

(1) [1913] A. C. 724, 737.

(2) [1916] 1 A. C. 688.

only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause": see per Lord Moulton in *Mason's Case*. (1) "It is not permissible to cut out words which form the main part of the construction of the covenant. The attempt to cut out here is to alter the main effect of the agreement. The business is a composite one and the covenant is with respect to the entirety. What is attempted is to cut the covenant down to a tailor's business.

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[They also referred to *Eastes v. Russ* (2) and *Great Western and Metropolitan Dairies v. Gibbs*. (3)]

Compston K.C. and *R. H. Norris* for the respondent. The respondent only desires to protect his trade connection. It is only persons in the position of managers of departments who are required to enter into this covenant. In country towns the businesses in question are usually carried on together. If the covenant is severable at all it ought not to be confined to the tailoring business but should extend to the hatter and hosiery businesses.

In *Mason's Case* (4) the facts were very different from those in this case. There was no possibility of severance there. There are dicta in that case which suggest that a covenant in restraint of trade over an area is not necessarily unreasonable.

Morris v. Saxelby (5) was the case of a young man who had been trained in a business of a very special character whilst in the service of the employers, and the House of Lords refused to force him out of that trade and compel him to learn another. There was an attempt to sever the covenant in that case, but the House held that even if severed it would still be bad.

In *Rogers v. Maddocks* (6) the covenant was held severable. This covenant is not wider than is necessary for the

(1) [1913] A. C. 724, 745.

(2) [1914] 1 Ch. 468.

(3) (1918) 34 Times L. R. 344.

(4) [1913] A. C. 724, 737.

(5) [1916] 1 A. C. 688.

(6) [1892] 3 Ch. 346.

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protection of the respondent's business, but if it is it can be severed by striking out all the enumerated businesses other than that of a tailor. On the facts there is a positive danger to the plaintiff of the defendant using his influence to divert business from the plaintiff to himself. The plaintiff has a proprietary right in his trade connection. The setting up in trade by the defendant in Worcester is in fact a solicitation by him of the plaintiff's customers. It would be injurious to servants if they were not allowed to enter into covenants like that in the present case, as it would tend to prevent them obtaining employment : *Dewes v. Fitch*. (1)

In the following cases covenants have been held severable, and as severed enforceable : *Rogers v. Maddocks* (2) ; *William Robinson & Co. v. Heuer* (3) ; *Bromley v. Smith* (4) ; *Maxim Nordenfelt Co. v. Nordenfelt* (5) ; *Mallan v. May* (6) ; *Nevanas & Co. v. Walker* (7) ; *Goldsohl v. Goldman*. (8)

[They also referred to *Mills v. Dunham* (9) ; *Davies, Turner & Co. v. Lowen* (10) ; and *Ropeways, Ltd. v. Hoyle*. (11)]

R. A. Willes in reply. The result of the cases cited may be stated in the following propositions : If from the nature of the servant's employment or for any other established reason the only method by which the master can obtain protection for his personal connection or business is by total prohibition of the servant from competing with him in a defined area, such a restraint is not illegal by reason of its preventing the servant from doing within that area acts which the master could not lawfully restrain. But in order to protect himself by such a method the master must prove (a) that at the date when the covenant was made the personal connection or business to be protected in fact covered the area of exclusion ; (b) that the nature of the servant's employment necessitated his total prohibition from the area ; and (c) that exclusion from the area, so justified, does not extend beyond

(1) [1920] 2 Ch. 159, 183.

(2) [1892] 3 Ch. 346.

(3) [1898] 2 Ch. 451.

(4) [1909] 2 K. B. 235.

(5) [1893] 1 Ch. 630 ; [1894] A. C.

535.

(6) (1843) 11 M. & W. 653.

(7) [1914] 1 Ch. 413.

(8) [1915] 1 Ch. 292.

(9) [1891] 1 Ch. 576, 580.

(10) (1891) 64 L. T. 655.

(11) (1919) 35 Times L. R. 285.

a reasonable time. The plaintiff has, it is submitted, failed to bring himself within any of these requirements.

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Cur. adv. vult.

July 30. The following judgments were delivered :

¹ LORD STERNDALÉ M.R. (after stating the facts as above set out). On this appeal, therefore, two questions arise, (1.) Is the contract severable? (2.) if so, is the agreement, when confined to the tailoring business, valid?

These questions are difficult, as they require the reconciliation of two principles : (1.) that of freedom of contract, by which a person is held bound by an agreement into which he has deliberately entered ; and (2.) that of freedom of work, by which an employer is prevented from restraining a servant from exercising his energies in work for himself or others to an extent greater than is necessary for the protection of the employer. They are also made more difficult by an alteration in the tendency of decisions on the subject, the earlier cases tending to the enforcement of the former principle, while the tendency of later decisions, especially those of *Mason v. Provident Clothing and Supply Co.* (1) and *Morris v. Saxelby* (2) is towards a stricter application of the latter. The result necessarily follows that statements in some of the earlier cases require, in the light of the later decisions, considerable modification before acceptance.

The doctrine of severability has been much criticized by Lord Moulton in *Mason v. Provident Clothing and Supply Co.* (3) and by Neville J. in *Goldsohl v. Goldman*. (4) These criticisms, however, were not accepted by the Court of Appeal : see Kennedy L.J. in *Goldsohl v. Goldman* (5) or by Sargant J. in *Nevanas & Co. v. Walker*. (6)

I think, therefore, that it is still the law that a contract can be severed if the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part remaining.

(1) [1913] A. C. 724.

(4) [1914] 2 Ch. 603, 613.

(2) [1916] 1 A. C. 688.

(5) [1915] 1 Ch. 292, 299.

(3) [1913] A. C. 724, 745.

(6) [1914] 1 Ch. 413, 423.

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This is sometimes expressed, as in this case by the Divisional Court, by saying that the severance can be effected when the part severed can be removed by running a blue pencil through it. This is a figurative way of expressing the principle, and like most figurative expressions may quite possibly lead to misunderstanding. I prefer the statement of principle of Sargant J. in *Nevanas & Co. v. Walker* (1), where he thus expresses it. He refers to the remarks of Lord Moulton in the case to which I have referred of *Mason v. Provident Clothing and Supply Co.* (2), and says: "I do not think that those remarks were intended to be applicable to cases where the two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves, and as to be substantially equivalent to two separate covenants."

It remains, therefore, to consider whether the covenant in this agreement can be considered as though it contained a number of several covenants each relating to a separate trade. I think it clear that if the severance of a part of the agreement gives it a meaning and object different in kind and not only in extent, the different parts of it cannot be said to be independent.

According to the decision in *Morris v. Saxelby* (3) a master can place a restraint upon the actions of his servant only to the extent necessary to protect himself against an improper use by the servant of the knowledge which he has acquired in the master's service: see Lord Atkinson in *Morris v. Saxelby* (3) and Lord Parker in the same case. (4)

It was argued on behalf of the appellant that the result of these statements was that no restraint could be good unless it were specifically stated to be limited to the acts described. I do not agree with this contention. I think it may be necessary to have a general restraint against trading in a certain area in order to avoid such acts on the part of the servant without specifying in the covenant the particular acts against which it is directed. Still, any restraint beyond

(1) [1914] 1 Ch. 413, 423.

(2) [1913] A. C. 724, 745.

(3) [1916] 1 A. C. 700, 702.

(4) Ibid. 709.

what is necessary to prevent such practices, and especially a restraint against competition only, is too wide: see the passages before cited from *Morris v. Saxelby*. (1)

I think it is necessary to examine the meaning of the agreement as unsevered in order to see whether it complies with the principles above stated, and then to see whether the severance alters the original meaning and effect of the agreement, or only limits the sphere of its operations. It is indorsed "Agreement not to trade in opposition within a radius of 10 miles of Regent House Kidderminster"; and it recites, as I have already read, "Whereas the assistant has requested the employers to employ him as an assistant in their business at Kidderminster at an annual salary commencing at 208*l.* and two and a half per cent. commission on turnover above 1000*l.* in the tailoring department, and the employers are only willing to do so upon him entering into the agreement not to trade in opposition with them which is hereinafter expressed." And then it proceeds in the terms that I have read. I should attach little, if any, importance to the words as to competition if they stood by themselves, because any restraint, however unobjectionable, involves some prohibition against trading in opposition, but I think it is permissible to look at the surrounding circumstances in which the agreement was made in order to arrive at its meaning. This was a common form agreement which was required from the head of every department, and each such head was required to agree not to engage in the business of any department however distinct from that of his own, for instance, children's outfitting and tailoring, and however unlikely or even impossible it might be for such head to be brought into contact with the customers of the other departments. If it be admissible to look at the plaintiff's evidence it becomes evident that this was his intention, for he referred in justification of the extent of the restriction to the fact that customers would have to pass through one department in order to get to another. Apart, however, from the evidence, I think it is quite clear that this agreement was part

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(1) [1916] 1 A. C. 688, 700, 702, 709.

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of a scheme by which every head of a department was to be restrained from competition with the plaintiff even in the business of departments with which he had no connection and with the customers of which he was never brought into contact. If this be the true meaning of the agreement, it was, as it is described, an agreement not to trade in opposition and not an agreement to restrain the unfair use of secrets or knowledge of customers acquired by the servant in the employer's service. To effect this object the retention of the restraint to the business of all the departments is necessary, and I think that to strike out all but the tailoring department is not merely to remove one of several covenants, each directed to the legitimate object of preventing unfair competition, but to alter entirely the scope and intention of the agreement. It is thereby sought to be converted from an agreement to restrain general competition into an agreement which will conform to the requirements of the cases to which I have referred.

I am of opinion that such a severance does not come within the principle stated by Sargant J., a statement which I accept, and that, therefore, this agreement should not be severed.

If this be right, the agreement is invalid, for as it stands it is far too wide and it is unnecessary to consider whether, if severed, it could be upheld.

The appeal should, in my opinion, be allowed, and judgment entered for the defendant with costs here and below.

ATKIN L.J. I agree that the appeal should be allowed. I am not proposing to deliver a judgment of my own, because I have read the judgment about to be delivered by Younger L.J., and I agree with it.

YOUNGER L.J. The three questions to which the argument in support of this appeal was directed were: first, whether the stipulations of the restrictive covenant in the agreement of February 15, 1909, were severable, as the Divisional Court thought they were; secondly, whether if these stipulations

were severable they ought in this case to be severed, as the Divisional Court also thought; and, lastly, whether if they were severed the covenant which would then remain, a covenant confined to the trade or business of a tailor only, was not, contrary to the view of that Court, still void as being in restraint of trade. There was no cross-appeal by the respondent from the finding of the Divisional Court that the covenant unsevered is invalid.

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Upon these questions so in debate I have arrived at the conclusion that the stipulations in this covenant are not severable, that the case is not one in which if they were the Court ought to sever them; and that even if the covenant be severed by deleting what Bailhache J. called the excess the resulting covenant would still be void as being in restraint of trade.

I regret in expressing these conclusions to find myself at variance with the learned judges of the Divisional Court. But the difference of opinion is really a difference on one matter only. Recent decisions of the House of Lords upon the invalidity of many of these covenants when imposed upon employees in contracts of service have, as I read them, effected, in more than one aspect of the subject, a much more fundamental change in hitherto accepted views upon it than has seemed to the learned judges of the Divisional Court to be the case. That is the main difference between us.

Now, we are here dealing with a branch of the law which has at all times been peculiarly susceptible to influence from current views of public policy. Its modern developments have grown up under the shadow of the "laissez faire" school of economics, and, until recently, have, in consequence, been uniformly in the direction of extending the principle of freedom of contract in relation to such bargains a tendency that has not yet ceased to be operative when the covenant in question is one exacted from a vendor on the sale of the goodwill of his business. But current opinion on the relations between employers and employed has moved rapidly in recent years, and thus it is that the House of Lords, itself bound by comparatively few of the numerous previous

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decisions on the subject, took the opportunity in 1913, when the validity of a restrictive covenant entered into by an employee came in question before it, to examine the whole problem afresh, with the result that the supreme tribunal, for the guidance of every Court, has now placed upon the permissibility of such covenants a limit which the general interest, including, of course, that of employees themselves, had not previously seemed to require. In consequence it must now, I think, be recognized in all Courts that there is every difference in the matter of its validity between such a covenant as we find here embodied in a contract of service and the same covenant when found in an agreement for the sale of goodwill; and the dispute between the parties to this action must be decided with due regard to that difference. This declared difference is, as I have said, a matter of recent development, and although it has not been put forward by the House of Lords as a new departure, its effect upon previously accepted views has already been as complete as if it were. Moreover, it may be doubted whether all its incidental consequences have even now become apparent.

A reference to two judgments of long standing and high authority dealing with this subject, one a judgment of the Court of Common Pleas, and the other a judgment of the Court of Chancery, will serve to show that this distinction now so strongly emphasized did not occur at all to the judges of an earlier day. The first of the judgments to which I refer is that of Erle C.J., in the case of *Mumford v. Gething* (1), a case of an employee's restrictive covenant; and the second, that of James V.-C. in *Leather Cloth Co. v. Lhorsont* (2), a case of a vendor's covenant. In each case the necessity in the general interest for upholding such covenants is strongly advocated, but in words so similar as to leave no room for drawing any distinction between the two classes of covenant in any matter of principle.

The passage from the judgment of Erle C.J. to which I have referred is as follows: "I entirely dissent from the notion thrown out by the defendant's counsel that agreements of

(1) (1859) 7 C. B. (N. S.) 305, 319.

(2) (1869) L. R. 9 Eq. 345.

this sort are to be discouraged as being contrary to public policy. On the contrary, I think that contracts in partial restraint of trade are beneficial to the public, as well as to the immediate parties ; for, if the law discouraged such agreements as these, employers would be extremely scrupulous as to engaging servants in a confidential capacity, seeing that they would incur the risk of their taking advantage of the knowledge they acquired of their customers and their mode of conducting business, and then transferring their services to a rival trader. It appears to me to be highly important that persons like this defendant should be able to enter into contracts of this sort, which will afford some security to their employers that the knowledge acquired in their service will not be used to their prejudice. I think the doctrine laid down by Parke B. in *Mallan v. May* (1) is a correct exposition of the law upon this subject. 'The public,' he says, 'derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business.' And the learned Baron afterwards adds : 'It is justly observed by Lord Wynford, in giving the judgment of the Court in *Homer v. Ashford* (2), that, it may often happen that individual interest and general convenience render engagements not to carry on trade, or act in a profession, in a particular place, proper ; that engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it ; and that the effect of such contracts is to encourage rather than cramp the employment of capital in trade, and the promotion of industry.' "

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In *Leather Cloth Co. v. Lhorsont* (3) James V.-C., dealing with a covenant by the vendor on the sale of goodwill, says :

"The principle is this : Public policy requires that every

(1) 11 M. & W. 653, 666.

11 J. B. Moore, 91.

(2) (1825) 3 Bing. 322, 326 ;

(3) L. R. 9 Eq. 345, 354.

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man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation however restrictive it is, provided that restriction in the judgment of the Court is not unreasonable, having regard to the subject matter of the contract."

Nor again can the existence of the distinction be traced in the historical account given by Lindley L.J. in the *Nordenfelt Case* (1) of the stages in which the law on this subject had, up to that date, gradually been relaxed to suit development of trade and to conform to current ideas and views of public policy and reasonableness: while in his judgment in the same case (2) Bowen L.J., after an elaborate review of all the cases, states his conclusion to be—a conclusion, be it noted, applicable indifferently to vendors' covenants and to employees' covenants—that by the year 1837 the idea had been fully realized that all partial restraints of trade which satisfied the conditions of the law as to reasonableness and good conduct were not an injury but a benefit to the public; and that by 1853 the further progress had been made—namely, in *Tallis v. Tallis* (3)—that the onus lay upon the person who attacked a covenant in partial restraint of trade to displace the consideration. The Lord Justice's own view of the law as it then stood he expresses thus (4): "Partial restraints, or, in other words, restraints which involve only a limit of places at which, or persons with

(1) [1893] 1 Ch. 630, 647.

(2) *Ibid.* 656.

(3) (1853) 1 E. & B. 391.

(4) [1893] 1 Ch. 662.

whom, or of modes, in which the trade is to be carried on, are valid when made for a good consideration, and where they do not extend further than is necessary for the reasonable protection of the covenantee." Bowen L.J.'s view there expressed, a view concurred in by the other judges of the Court of Appeal, and supported by a long line of common law authority, was in other words this—that at that date general or unlimited restraints in trade were as they had always been void as being contrary to public policy, but that partial restraints in the sense indicated by him were *prima facie* valid. In the words of Lindley L.J., every such restraint the Court upheld, unless it was affirmatively shown to be unreasonable as extending further than was required for the protection of the covenantee.

Now it is very important in the present case to bear in mind the confident assertion by the Court of Appeal in the *Nordenfelt Case* (1) that these partial restraints were valid. The actual covenant in question in that case was a general restraint, and that covenant—one between vendor and purchaser—was there held valid. And the decision of the Court of Appeal to that effect was upheld by the House of Lords unanimously, while the view of the Court of Appeal as to the *prima facie* validity of partial restraints did not fail to meet with approval in that House, for example, at the hand of Lord Herschell. The Homeric battle which Lord Macnaghten there waged in support of the authorities in equity attacked by Bowen L.J.—authorities to the effect that all covenants in restraint of trade, partial as well as general, were *prima facie* invalid—had no influence upon the actual decision of the House which was concurred in by all the noble and learned Lords irrespective of their views on that point. Indeed, the decision of the House did not in terms affirm with reference to partial restraints either the one view or the other. Thus it was that until the judgment of the House of Lords in *Mason's Case* (2) in 1913, in which Lord Macnaghten's so-called test in the *Nordenfelt Case* (1), a test which embodied the equity view,

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(1) [1893] 1 Ch. 630.

(2) [1913] A. C. 724.

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was definitely declared by the House to embody the correct statement of the law, Lord Bowen's opinion particularly, in confining, as it does, all considerations of reasonableness to the position of the covenantee alone, and in treating all partial restraints as *prima facie* good, and not Lord Macnaghten's test indicating the contrary, continued to provide all lower Courts with their working rule. Since *Mason's Case* (1), however, Lord Macnaghten's test has become the touchstone of the matter, and the House of Lords has found in it and in the distinction between vendors' covenants and employees' covenants to which in his speech Lord Macnaghten refers the foundation for the pronounced views with reference to the limited permissible scope of employees' covenants which the House has then and since developed.

The direct reference to this distinction in Lord Macnaghten's speech is to be found in the following passage from it (2): "To a certain extent, different considerations must apply in cases of apprenticeship and cases of that sort, on the one hand, and cases of the sale of a business or dissolution of partnership on the other. A man is bound an apprentice because he wishes to learn a trade and to practise it. A man may sell because he is getting too old for the strain and worry of business, or because he wishes for some other reason to retire from business altogether. Then there is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment." Certainly the distinction is there found in these words, but I cannot find that it had, before *Mason's Case* (1), any influence at all upon any intervening decision on employees' covenants. Except in the case of *Leng v. Andrews* (3), to which reference will again be made, the views of such covenants enunciated by the common law Courts prior to the *Nordenfelt Case* (4) continued to be enforced without any manifest alteration, notwithstanding that the resulting mischief, as he saw it, was more than once alluded

(1) [1913] A. C. 724.

(2) [1894] A. C. 535, 566.

(3) [1909] 1 Ch. 763.

(4) [1894] A. C. 535.

to by Neville J.: see *Leetham v. Johnstone-White* (1), where however, the learned Judge felt himself bound to acquiesce in it, so well settled did he conceive the law to be. At length, however, in 1913, as I have said, the House of Lords in *Mason v. Provident Clothing and Supply Co.* (2) and in 1916 in the subsequent case of *Morris v. Saxelby* (3), defined the limited permissible effect of such a covenant; and the difference between it and one entered into by a vendor was then at length clearly emphasized. The subject is thus introduced by Lord Haldane in his speech in *Mason's Case* (4): "It is no doubt as a general rule wise to leave adult persons to make their own agreements and take the consequences, but in the present class of case considerations of public policy come in and make it necessary for the Court to scrutinize agreements like the one before your Lordships jealously. The practice of putting into these agreements anything that is favourable to the employer is one which the Courts have to check, and the judges have to see that Lord Macnaghten's test is carefully observed." Lord Shaw in the same case expresses the view that there is much greater room for allowing as between buyer and seller a larger scope for freedom of contract and a correspondingly large restraint in freedom of trade than there is for allowing a restraint of the opportunity for labour in a contract between master and servant or an employer and an applicant for work.

Proceeding upon these lines, the House of Lords has developed this distinction, and the following points may now, I think, be taken to be established.

First, it is the covenantee, the respondent here, who has to show that the restriction sought to be imposed upon the covenantor goes no further than is reasonable for the protection of his business. This obligation was so laid down by Lord Haldane in *Mason's Case* (5) and, notwithstanding the judgment of Swinfen-Eady L.J., in *Eastes v. Russ* (6), who pointed out that this view displaced the rule laid down

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(1) [1907] 1 Ch. 189, 194.

(2) [1913] A. C. 724.

(3) [1916] 1 A. C. 688.

(4) [1913] A. C. 724, 734.

(5) [1913] A. C. 724, 733.

(6) [1914] 1 Ch. 468.

C. A. in sundry cases of high authority, it was adhered to by
 1920 the House in *Morris v. Saxelby* (1): see the speech of Lord
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Now it is interesting to note how great was the change thereby made. In 1891, that is, before the *Nordenfelt Case* (3), Lindley L.J. in *Mills v. Dunham* (4) had said this: "I think that Mr. Levett's contention that you are to treat a restraint of trade as prima facie bad, and throw upon the person supporting it the onus of showing that it is reasonable, is introducing a wholly unsound principle into the construction of documents." And in 1899, that is, after the *Nordenfelt Case* (3), Romer L.J., in *Haynes v. Doman* (5) expressed himself thus: "Where a man of sufficient age and business capacity knowingly enters into a contract of service which is only in partial restraint of trade, I think the onus lies on him to prove that it goes beyond what was reasonably necessary." That is to say, the Court of Appeal in these decisions after as well as before the *Nordenfelt Case* (3) followed the common law rule as therein enunciated by Bowen L.J. and by Lord Herschell as if it still were the rule of the Court. But when in *Mason's Case* (6) Lord Macnaghten's test was definitely accepted as the true one the burden of proof in all these cases necessarily changed, as appears from the following passage in Lord Parker's judgment in *Morris v. Saxelby* (1): "As I read Lord Macnaghten's judgment" in the *Nordenfelt Case* (3), Lord Parker says "he was of opinion that all restraints on trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course"—these words "of course" are noticeable—"rest on the party alleging them." Now, when it is remembered that the leading cases.

(1) [1916] 1 A. C. 688.

(2) Ibid. 700.

(3) [1894] A. C. 535.

(4) [1891] 1 Ch. 576, 586.

(5) [1899] 2 Ch. 13, 30.

(6) [1913] A. C. 724.

on severance were decided at a time when such partial restraints were treated as prima facie valid, and when the rule of the Court, dating from *Tallis v. Tallis* (1), was that it rested with the covenantor who was bound by and sought to escape from a covenant of partial restriction to establish its invalidity, the importance of this pronouncement on the severance aspect of the present case is obvious.

Secondly—and this is established by the recent cases in the House of Lords—the restraint must be reasonable not only in the interests of the covenantee but in the interests of both the contracting parties. This disposes of the almost passionate protest of Neville J. in *Leetham v. Johnstone-White* (2) that no agreement was invalid, provided the restriction was reasonably necessary for the protection of the employer, however oppressive to the employee and fatal to his chance of obtaining his own living in this country it might be. This is no longer so, although under Bowen L.J.'s rule the statement was, I think, justified. This modern view of the House of Lords does not, however, involve the restoration of the old principle at one time obtaining that the consideration received by the employee for his covenant must be adequate. It has not. "The Court no longer considers the adequacy of the consideration in any particular case," says Lord Parker in *Morris v. Saxelby* (3), but it does involve, per Lord Shaw in the same case (4), and the consideration is of importance in the present case, that as the time of restriction lengthens or the space of its operation grows, the weight of the onus on the covenantee to justify it grows too.

Thirdly, and the most important of all. An employer is not entitled by a covenant taken from his employee to protect himself after the employment has ceased against his former servant's competition per se, although a purchaser of goodwill is entitled to protect himself against such competition on the part of his vendor. There are at least two reasons given for this distinction. An employer may not, after his servant has

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(1) 1 E. & B. 391.

(2) [1907] 1 Ch. 189, 194.

(3) [1916] 1 A. C. 688, 707.

(4) Ibid. 715.

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left his employment, prevent that servant from using his own skill and knowledge in his trade or profession, even if acquired when in the employer's service. That skill and knowledge are only placed at the employer's disposal during the employment. They have not been made a subject of sale after that employment has ceased: see *Leng v. Andrews*. (1) Again, when a purchaser takes over the goodwill of a business, if he is to have all its advantages it must in his hands be immune from its former owner exercising his special knowledge and skill to its detriment, and without a covenant on the part of the vendor against competition a purchaser cannot get what he is contracting to buy, nor can the vendor give what he is intending to sell. But, on the other hand, as is pointed out by Lord Parker in *Morris v. Saxelby* (2), the case is very different when the employer takes such a covenant from his employee. The employer's goodwill is always necessarily subject to the competition of all persons, including the employee, who choose to engage in a similar trade. "The employer in such a case is not endeavouring to protect what he has, but to gain a special advantage he could not otherwise secure." Accordingly covenants against competition by a former servant are as such not upheld; and the permissible extent of any covenant imposed upon a servant must be tested in every case with reference to the character of the work done for the employer by the servant while in his service and by the consideration whether in that view the covenant taken from him goes further than is reasonably necessary for the protection of the proprietary rights of the covenantee. "The reason, and the only reason," says Lord Parker in *Morris v. Saxelby* (3) "for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary. Such a restraint has, so far as I know, never been upheld, if directed only to the

(1) [1909] 1 Ch. 763.

(2) [1916] 1 A. C. 688, 709.

(3) *Ibid.* 688, 710.

prevention of competition or against the use of the personal skill and knowledge acquired by the employee in his employer's business."

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Fourthly, in the opinion at least of two learned Lords, Lord Shaw and Lord Moulton, previously accepted rules as to the doctrine of severance require careful application if not entire reconsideration. To this point I will return.

Proceeding now to apply these principles to the facts of the present case, the position appears to be that the respondent is the owner of a considerable business at Kidderminster, described in the agreement in question as a business of drapers, tailors and general outfitters. The business is, I presume for convenience, divided into different departments all under the same roof, customers going from one to another, and many customers dealing in all departments. The agreement into which the appellant entered, a printed form which all managers of departments are required to sign with modifications of salary and detail appropriate to the individual case, is indorsed as "An agreement not to trade in opposition within a radius of 10 miles of Regent House, Kidderminster," and contains a recital "that the assistant," the appellant, "has requested the employers to employ him as an assistant in their business at Kidderminster at an annual salary commencing at 208*l.* and two and a half per cent. commission on turnover above 1000*l.* in tailoring department and the employers are only willing to do so upon his entering into the agreement not to trade in opposition with him which is hereinafter expressed" and witnesses "that in consideration of the employers employing him in the capacity and at the salary aforesaid . . . he will not at any time thereafter . . . carry on or be in any way directly or indirectly concerned in any of the following trades or businesses, that is to say, the trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies' or children's outfitter at any place, within a radius of 10 miles of the employers' place of business at Regent House, Kidderminster, aforesaid." The agreement is expressed to be and is, in my opinion, nothing more than an agreement not to trade in opposition with the

C. A. employers in any part of their business. It will be broken if
1920 the appellant not only carries on but is directly or indirectly
ATTWOOD concerned in any of the specified businesses ; and the period
v. of restriction is to cover the whole life of the appellant, although
LAMONT. the employment was itself an employment only for a
Younger L.J. month certain. The appellant, while it is not so stated in
the agreement, was manager of the tailoring department
and was the principal or only cutter in the respondent's
employ. He measured, cut, and fitted on the clothes made
in that department, and in doing so, he, of course, became
acquainted with the customers. He is said to be an
extremely skilful cutter, and the department prospered when
under his management. He has now set up in business at
Worcester, beyond the ten-mile radius, but he has supplied
with clothes former customers of the respondent within that
radius, and has also fitted on their clothes within it. That
is the breach of covenant complained of. The evidence of a
Mr. Middleton called to prove one such breach was that he
had been measured and fitted by the appellant when he was
at the respondents ; that he gave him every satisfaction ;
that he met him in Broad Street, Worcester, one day and
said : " I hear you have started business in Worcester, I
may as well give you an order, send me over some patterns."
That evidence confirms me in the conclusion which I should
have drawn from the case generally, that it is the appellant's
known personal skill as a cutter which attracts to him the
customers to whom he attended when with the respondent,
and except that they made his acquaintance when he was in
the respondent's service, it was not his position there, but it
is his own skill which leads them to desire to have the continued
benefit of his services, now that he is in business for himself.
The question accordingly is whether in these circumstances,
and in view of the principles applicable to them enunciated
by the House of Lords, this covenant has any validity. In
my opinion, as I have already said, it has none. It was
apparently strongly urged in the Divisional Court that the
covenant was valid as it stands. The learned judges there
held that extending to businesses with which the appellant

had had no connection when in the respondent's employment it was manifestly too wide, and they so held.

But the learned judges held also that they were entitled to sever the covenant by limiting it to the business of a tailor, and this they did.

Now I agree with the Master of the Rolls that this was not a case in which upon any principle this severance was permissible. The learned judges of the Divisional Court, I think, took the view that such severance always was permissible when it could be effectively accomplished by the action of a blue pencil. I do not agree. The doctrine of severance has not, I think, gone further than to make it permissible in a case where the covenant is not really a single covenant but is in effect a combination of several distinct covenants. In that case and where the severance can be carried out without the addition or alteration of a word, it is permissible. But in that case only.

Now, here, I think, there is in truth but one covenant for the protection of the respondent's entire business, and not several covenants for the protection of his several businesses. The respondent is, on the evidence, not carrying on several businesses but one business, and, in my opinion, this covenant must stand or fall in its unaltered form.

But, further, I am of opinion that even if this were not so this case is not one in which any severance, even if otherwise technically permissible, ought to be made. In my view the necessary effect of the application of the principle on which *Mason's Case* (1) and *Morris v. Saxelby* (2) have both been decided has been to render obsolete the cases in which the Courts have severed these restrictive covenants when acting on the view that being prima facie valid it was their duty to bind the covenantee to them as far as was permissible. It may well be that these cases are still applicable to covenants between vendor and purchaser, for upon such covenants the effect of Lord Macnaghten's test upon the law as previously

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understood has been little more than a matter of words, and Lord Moulton's observations, now to be referred to, have no direct application to such covenants. But these authorities do not seem to me to be any longer of assistance in the case of a covenant between employer and employee. To such a covenant I think the statement of Lord Moulton in *Mason's Case* (1) necessarily applies. Lord Moulton there says this (2) : " I do not doubt that the Court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though taken as a whole the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause. It would in my opinion be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master." Then after a passage which does not apply to this case his Lordship goes on : " and the hardship imposed by the exaction of unreasonable covenants by employers would be greatly increased if they could continue the practice with the expectation that, having exposed the servant to the anxiety and expense of litigation, the Court would in the end enable them to obtain everything which they could have obtained by acting reasonably." Lord Shaw expresses the same opinion in his speech where he says (3) : " Courts of law should not be astute to disentangle such contracts and to grant injunctions or restraints which are not justified by their terms." And these opinions are very strongly re-enforced by the following extract from the judgment in *Goldsoll v.*

(1) [1913] A. C. 724.

(2) [1913] A. C. 724, 745.

(3) [1913] A. C. 724, 742.

Goldman (1) of Neville J., a learned judge whose words on this subject deserve to have special weight attached to them in that he was a pioneer on the road subsequently taken by the House of Lords. "It seems to me to be in accordance both with principle and justice that if a man seeks to restrain another from exercising his lawful calling to an extent which the law, even as it now stands, deems unreasonable, the contract by which he does so, whether grammatically severable or not, should be held to be void in toto. To hold otherwise seems to me to expose the covenantor to the almost inevitable risk of litigation which in nine cases out of ten he is very ill able to afford, should he venture to act upon his own opinion as to how far the restraint upon him would be held by the Court to be reasonable, while it may give the covenantee the full benefit of unreasonable provisions if the covenantor is unable to face litigation."

In my judgment a reference to the very principle which, in the view of the House of Lords, rendered the closest scrutiny of these covenants essential makes it necessary, if that scrutiny when fruitful is to be operative, that severance where the covenant as a whole is invalid should not in the general case be allowed. I know that this view has not been taken either by Sargant J. in *Nevanas & Co. v. Walker* (2) or by the Court of Appeal in *Goldsoll v. Goldman* (3) on the ground generally that the question did not directly arise in *Mason's Case* (4) and that the House of Lords could not be supposed in what was there said to have cast doubt on successive decisions of the Court of Appeal which had held that the doctrine of severability applied to such covenants. But it is to be observed that both of these judgments were given before the decision of *Morris v. Saxelby* (5), in which the principles of *Mason's Case* (4) were strengthened and re-enforced, and in which it was made plain that the House of Lords had there at least made havoc of strong uniform previous decisions as to the burden of proof, to which I have already referred.

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(1) [1914] 2 Ch. 603, 613.

(3) [1915] 1 Ch. 292.

(2) [1914] 1 Ch. 413.

(4) [1913] A. C. 724.

(5) [1916] 1 A. C. 688.

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Sargant J. too held that the covenant in the case before him was invalid even if severed, so that his remarks on severance were by the way, while the covenant in *Goldsoll v. Goldman* (1) was one between vendor and purchaser to which the principle of *Mason's Case* (2) is not, as I have pointed out, directly applicable.

Now, while censure in reference to the covenant with which we have to deal is not fairly attributable to the respondent, for the agreement is dated in 1909 when even the Court of Appeal had, in view of the subsequent decision in *Mason's Case* (2), failed fully to appreciate the effect of the *Nordenfelt Case* (3); still, this case is not, I think, one in which the Court, if it need not do so, should be astute to sever its provisions. This system of printed covenants prepared beforehand for signature by every future employee, irrespective of the nature of his employment or his personal qualifications, is to be deprecated in the interests of fair play, and the system is only likely to disappear if it be thoroughly understood by employers that such covenants will not be assisted in cases where in their integrity they are found to be oppressive. I think, therefore, that there ought to be no severance here.

Lastly, I am of opinion that even if the covenant be severable and be severed as the Divisional Court have severed it, it remains invalid.

The severed covenant continues to be a covenant against competition, and in my opinion in the circumstances of this case, a covenant against competition only. The appellant is a dangerous rival of the plaintiff in his own district, not by reason of any knowledge of the plaintiff's connection or customers possessed by the appellant, but by reason of his own skill. The covenant is quite inappropriate to protect the plaintiff against such activities of the appellant as, apart from competition, might be regarded as injurious to his goodwill, and, moreover, being a covenant for life and excluding the appellant for that period from a considerable area

(1) (1914) 2 Ch. 603.

(2) [1913] A. C. 724.

(3) [1894] A. C. 535.

with reference to the great bulk of whose residents, in connection with tailoring, the plaintiff has no relation at all, it is, I think, on any view, unreasonably wide. This in my judgment was not a case in which from the nature of the appellant's employment the only method by which the respondent could obtain protection for that which he was entitled to protect was by prohibiting competition on the part of the appellant in a defined area. I agree that had that been the case such a restraint, if otherwise reasonable, would not have been illegal by reason of its preventing the appellant from doing within that area acts which the respondent could otherwise not lawfully restrain. But in my opinion this was not such a case. The covenant is essentially inappropriate to the attainment of any legitimate purpose of the respondent, while as it stands it has not been justified by any evidence from him that his connection required so wide a restraint, or, at any rate, a restraint so extended in duration.

I fully share, if I may be allowed to say so, Sankey J.'s view that the Court should not lightly absolve parties from the performance of contracts solemnly entered into. Lord Watson's words in the *Nordenfelt Case* (1) must also command immediate assent: "that the community has a material interest in maintaining the rules of fair dealing between man and man"; and that "It suffers far greater injury from the infraction of these rules than from contracts in restraint of trade." Even so, however, there has developed in late years in these employees' covenants a distinct tendency to make them penal rather than protective, and if that mischievous tendency can only be effectively checked by absolving in a few cases from their bargain employees who have no equity to claim release, the result is still not altogether regrettable. It must not, however, be supposed that I take this to be one of these cases. In my judgment the appellant here is deriving no substantial advantage in what he is doing from his previous connection with the respondent's business. Even, however, if he were, the

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(1) [1894] A. C. 535, 552.

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decision in his favour might do this service—it might compel employers to consider the proper limit of restraint which in any particular case they are fairly entitled to insist upon, and having kept the restriction imposed within these limits they will not without success apply to the Courts to exercise their primary function of seeing to it that such bargains like any others fairly entered into are duly observed.

For these reasons I am of opinion that this appeal should be allowed and the judgment of the county court judge restored with costs here and below.

Appeal allowed.

Solicitor for appellant: *Arthur C. Dowding, for Eustace Roberts, Worcester.*

Solicitors for respondent: *Milner & Bickford, for H. G. Ivens, Kidderminster.*

W. I. C.

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June 15.

BANNISTER, APPELLANT v. CLARKE, RESPONDENT.

Justices—Summary Jurisdiction—Claim by Defendant to be tried by Jury—Committal for Offence not triable by Jury—Nullity—Subsequent Summary Trial—Autrefois acquit—Different Offences—Betting Act, 1853 (16 & 17 Vict. c. 119), ss. 1, 3—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 79.

By s. 79 of the Licensing (Consolidation) Act, 1910, it is an offence punishable on summary conviction by a fine not exceeding 20*l.* for the holder of a justices' licence to suffer his premises to be used in contravention of the Betting Act, 1853.

By ss. 1 and 3 of the Betting Act, 1853, it is an offence punishable by fine or imprisonment not exceeding six months for the occupier of premises to use them for the purpose of betting with persons resorting thereto.

By s. 17 of the Summary Jurisdiction Act, 1879, a person charged before a Court of summary jurisdiction with an offence punishable with imprisonment exceeding three months may claim to be tried by a jury.

The appellant was the licensee of the Gate Inn at Matlock. On April 30, 1919, six informations were laid against him. Five of them charged that he, being the licensee of the Gate Inn, had on April 21, 1919, and other dates respectively, suffered the premises to be used by certain persons for the purpose of betting with persons resorting thereto in contravention of the Betting House Act, 1853, contrary to the form of the statute in such case made and provided. The sixth information charged that the appellant on April 21, 1919, he then being the occupier

of the Gate Inn, unlawfully did use the same for the purpose of betting with persons resorting thereto. The six informations were heard together by justices sitting as a Court of summary jurisdiction. The appellant claimed to be tried by a jury, and he was committed for trial on all the informations. At quarter sessions he was indicted and tried for the offence under the Betting Act, 1853, alleged to have been committed at the Gate Inn on April 21, and was acquitted. The justices subsequently heard the first five informations, and convicted the appellant on each of them. The appellant appealed to quarter sessions. The appeal as to the offence alleged on April 21 was allowed, and the other appeals were dismissed :—

Held, (1.) that the offence under the Betting Act, 1853, is not the same offence as that created by s. 79 of the Licensing (Consolidation) Act, 1910, and the appellant had not been twice placed in jeopardy for the same offence; and (2.) that as a person charged with an offence under s. 79 has no right to claim to be tried by a jury, the act of the justices in purporting to commit the appellant for trial on the five informations which alleged offences under s. 79 was a mere nullity and did not deprive the justices of jurisdiction to hear those informations summarily at a subsequent date.

Rex v. Marsham [1912] 2 K. B. 362 followed.

SPECIAL CASE stated by the Court of Quarter Sessions for the County of Derby.

On April 30, 1919, six informations against the appellant, Frederick George Bannister, were laid by the Superintendent of Police at Matlock. The first information charged that the appellant, on April 11, 1919, at Matlock then being the holder of a licence for the sale of intoxicating liquors by retail in his house and premises there situate called the Gate Inn did unlawfully suffer the said house and premises to be used by one Roose and other persons for the purpose of betting with persons resorting thereto in contravention of the Betting House Act, 1853, contrary to the form of the statute in such case made and provided (1), and the appellant was summoned to appear

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(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 79: "(1) The holder of a justices' licence shall not—

"(b) open, keep, or use his premises in contravention of the Betting Act, 1853, or suffer his premises to be opened, kept, or used in contravention of that Act."

"(2) If the holder of a justices'

licence acts in contravention of this section, he shall be liable in respect of each offence to a fine not exceeding in the case of the first offence ten pounds, and in the case of any subsequent offence twenty pounds."

Sect. 99: "(1.) Except as otherwise expressly provided, any offence under this Act may be prosecuted, . . . in manner provided by the Summary Jurisdiction Acts."

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before a Court of summary jurisdiction at Matlock to answer to the said information. Four of the informations charged the appellant with a similar offence on April 12, 16, 19 and 21, 1919. The sixth information charged that the appellant on April 21, 1919, then being the occupier of the Gate Inn, unlawfully did use the same for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to certain horse races contrary to the form of the statute in such case made and provided. (1)

The informations were heard together by justices sitting as a Court of summary jurisdiction at Matlock on May 7, 1919, when counsel for the appellant claimed that the appellant should be tried by a jury, and the justices thereupon committed the appellant for trial on all the informations at the ensuing quarter sessions for the county of Derby. The appellant duly entered into his recognizances to appear and stand his trial at the quarter sessions.

On July 12, 1919, an indictment was preferred at the quarter sessions against the appellant, which by the first count charged him with keeping a house for the purpose of betting contrary to the Betting Act, 1853; the particulars alleged the offence to have been committed at the Gate Inn on April 21, 1919. The second count charged the appellant with suffering a house to be used for the purpose of betting contrary to the Betting Act, 1853; the particulars alleged that the appellant being the occupier of the Gate Inn on April 21, 1919, did suffer the same to be used by Samuel Roose and others for the purpose of betting with persons resorting thereto.

(1) Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, . . . betting with persons resorting thereto; . . ."

Sect. 3: "Any person who, being the owner or occupier of any house . . . shall . . . use the same for the

purposes hereinbefore mentioned . . . ; and any person who being the owner or occupier of any house . . . shall knowingly and wilfully permit the same to be . . . used by any other person for the purposes aforesaid" shall be liable to a penalty not exceeding 100*l.* or imprisonment with or without hard labour for any time not exceeding six months.

The appellant was tried and acquitted upon the first count of the indictment, and the Court of quarter sessions quashed the second count upon objection being taken to it on the ground that the charge set out therein was preferred under the Licensing Consolidation Act, 1910, and that the Court had no jurisdiction to try that charge.

On August 1, 1919, the justices at Matlock sitting as a Court of summary jurisdiction proceeded to hear the informations laid against the appellant on April 30, other than the sixth information, and after hearing the evidence convicted the appellant on each of the informations.

The appellant appealed against the convictions to quarter sessions.

Upon the hearing of the appeals, which were taken together, it was contended on behalf of the appellant that the justices were wrong in law in convicting the appellant on the informations of April 30, on the grounds that the appellant having been committed for trial thereon had been placed in jeopardy in respect of the offences therein set out, and that the justices, therefore, had no jurisdiction to hear the informations; further, that the statement of the offences set out in the informations was equally applicable to offences under the Betting Act, 1853, as to offences under the Licensing (Consolidation) Act, 1910, and that the justices by acceding to the appellant's application to be tried by a jury, and in committing the appellant for trial, elected to treat the offences as offences under the Betting Act, 1853, and divested themselves of jurisdiction to adjudicate thereon subsequently under the Licensing (Consolidation) Act, 1910.

It was contended on behalf of the respondent that the justices had been misled by the application of counsel at the hearing of May 7 into believing that the offences charged in the informations could be dealt with by indictment at quarter sessions, and that had they not been so misled they would have dealt with them summarily. It was further contended that the appellant had not been in peril on the said informations as the indictment against him at quarter sessions upon which he was tried and acquitted did not include the offences

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set out in the informations of April 30 which had been heard by the justices on August 1.

The Court of quarter sessions were of opinion that the justices had jurisdiction to hear the informations and to receive evidence thereon and to convict the appellant, and the Court accordingly heard the appeals and allowed the appeal against the conviction in respect of the offence alleged to have been committed on April 21, and dismissed the other appeals. The question for the opinion of the Court was whether the decision of quarter sessions was right in law.

Maddocks K.C. and *T. N. Winning* for the appellant. The offences created by ss. 1 and 3 of the Betting Act, 1853, and by s. 79 of the Licensing (Consolidation) Act, 1910, are in substance the same offence—namely, permitting or suffering premises to be used for the purpose of betting with persons resorting thereto: *Somerset v. Wade* (1); *Sims v. Pay.* (2) By s. 33 of the Interpretation Act, 1889, where an act or omission constitutes an offence under two Acts the offender may be prosecuted and punished under either Act, but he shall not be liable to be punished twice for the same offence. The appellant was placed in jeopardy of a conviction upon the informations under the Licensing Act at the hearing before the justices on May 7. Further, the appellant having been acquitted on the indictment preferred under the Betting Act could effectually plead autrefois acquit to the informations under the Licensing Act, the offences being the same: *Reg. v. Miles* (3); *Rex v. Barron* (4); *Rex v. Tonks.* (5) The appellant had been placed in peril on his trial on the indictment of a conviction on the same facts which it was necessary to prove in order to secure a conviction under the Licensing Act. Secondly, the informations did not state in terms whether they were laid under the Betting Act or the Licensing Act. The language used was consistent with the offence alleged being under either Act. The justices by

(1) [1894] 1 Q. B. 574.

(3) (1890) 24 Q. B. D. 423.

(2) (1889) 53 J. P. 420.

(4) [1914] 2 K. B. 570.

(5) [1916] 1 K. B. 443.

committing the appellant for trial on all the indictments must be deemed to have treated them all as being informations under the Betting Act, for if they were under the Licensing Act there was no power under s. 17 of the Summary Jurisdiction Act, 1879, to commit the appellant for trial. Having committed the appellant for trial the Court was functus officio and had no jurisdiction subsequently to hear and determine the informations on the footing that the offences were charged under the Licensing Act.

H. H. Joy for the respondent. The appellant cannot successfully plead autrefois acquit. The offences created by the two Acts are not the same, for the offence under s. 79 of the Licensing Act can only be committed by the holder of a licence for the sale of intoxicating liquor by retail, whereas under the Betting Act the offence may be committed by any person and in respect of a house of any description. Further, s. 3 of the Betting Act contains the words "knowingly and wilfully" which are not in s. 79. As to the second point, the informations clearly alleged an offence under s. 79, the terms of which are followed, and the act of the justices in committing the appellant for trial on those informations was purely nugatory: *Rex v. Marsham* (1); *Davis v. Morton* (2); and there was therefore no reason why the justices should not subsequently hear and determine these informations.

Maddocks K.C. replied.

EARL OF READING C.J. The appellant is the holder of a licence for the sale of intoxicating liquor by retail in a house called the Gate Inn. In April, 1919, a number of informations were laid against him. One of the informations charged him with having unlawfully used the Gate Inn on April 21, 1919, for the purpose of betting on horse races with persons resorting thereto. That is an offence under the Betting Act, 1853, and the offence is one which can be committed in respect of any premises, whether they are licensed or not, and it is immaterial whether the person charged is or is not the holder of a licence for the sale of intoxicating liquor. The other informations

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(1) [1912] 2 K. B. 362.

(2) [1913] 2 K. B. 479.

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charged that the appellant being the holder of a licence for the sale of intoxicating liquor did on various dates unlawfully suffer the Gate Inn to be used by certain persons for the purpose of betting with persons resorting thereto in contravention of the Betting Act, 1853. That is an offence created by s. 79 of the Licensing (Consolidation) Act, 1910, and it is an offence which can only be committed by the holder of a licence. When the informations came on for hearing before justices sitting as a Court of summary jurisdiction the appellant claimed the right, under s. 17 of the Summary Jurisdiction Act, 1879, to be tried by a jury, and the justices thereupon committed the appellant for trial at quarter sessions on all the informations, that is, on the information under the Betting Act, and also on the informations under the Licensing Act, although the offence under s. 79 is one to which s. 17 of the Act of 1879 does not apply, and the justices had therefore no power to commit the appellant in respect of the charges under s. 79. At the quarter sessions an indictment was preferred against the appellant for an offence under the Betting Act only. He was acquitted on one count, and the other count was quashed, whether rightly or wrongly it is immaterial now to consider. The matter then came again before the justices in petty sessions and they proceeded to hear the informations laid under s. 79 of the Licensing Act and they convicted the appellant on each of those informations. The appellant appealed against the convictions to quarter sessions. The appeal was successful in the case of one conviction, and in the other cases the appeals were dismissed, subject to this case.

On behalf of the appellant two points have been raised. First, it is said that as the appellant had been acquitted of the offence charged under the Betting Act he could not subsequently be tried and convicted for an offence under s. 79, inasmuch as the offence is the same in each case—namely, using or permitting the use of a house in contravention of the Betting Act—and that in the circumstances of this case the appellant could therefore plead *autrefois acquit* to the charges under the Licensing Act. When once this contention has been stated it carries with it its own refutation. The offence under

the Betting Act is not the same as the offence under s. 79. It is a distinct and separate offence. This case cannot be brought within the decision of the Court of Criminal Appeal in *Rex v. Barron* (1), where I said: "The principle on which this plea depends has often been stated. It is this, that the law does not permit a man to be twice in peril of being convicted of the same offence. (2) If, therefore, he has been acquitted, i.e., found to be not guilty of the offence, by a Court competent to try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment. Thus an acquittal on a charge of murder is a bar to a subsequent indictment for manslaughter, as the jury could have convicted of manslaughter." (3)

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In my judgment the principle of law is there correctly stated, and it disposes of the appellant's contention, because the offences in this case are not identical or substantially the same. In the one case the offence is one which can only be committed by the holder of a licence for the sale of intoxicating liquor by retail; in the other case it can be committed by a person who is not the holder of a licence. For these reasons the contention as to the plea of *autrefois acquit* fails. I am not unmindful of s. 33 of the Interpretation Act, 1889, which provides that where an act constitutes an offence under two Acts the offender shall be liable to be prosecuted under either of those Acts "but shall not be liable to be punished twice for the same offence." That section has no application to this case because the offences are not the same offences.

The second point urged on behalf of the appellant is that when the justices had committed the appellant for trial on the informations which charged offences under s. 79 of the Licensing Act they had exhausted their jurisdiction to adjudicate upon those informations and could not subsequently proceed to hear and determine them. That argument, in

(1) [1914] 2 K. B. 574.

1824).

(2) 2 Hawkins, P. C., c. 35 (ed.

(3) 2 Hale, P. C., p. 246 (ed. 1800).

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my opinion, is also based on a fallacy. When the justices purported to commit the appellant on these informations, they were doing something which in law they had no power to do. Their act was null and void ; the position was the same as if the appellant had never been committed on those informations. The justices had not adjudicated at all upon them, and in no sense can the justices be said to have exhausted their jurisdiction. Authority for this proposition is to be found in *Rex v. Marsham*. (1) In that case a woman was convicted by a magistrate of an assault, but by some inadvertence the witness who proved the assault had given his evidence without being sworn. The magistrate, on the irregularity being discovered, reheard the case and again convicted the accused person. An application was made to this Court for a writ of certiorari to quash the conviction. In support of the magistrate's decision it was argued that the first hearing did not place the defendant in danger of being convicted by reason of evidence not on oath having been given. On the other side it was contended that though the conviction on the first hearing might have been quashed, that did not make the hearing a nullity, but Lord Alverstone C.J. and the other members of the Court were of opinion that there was no ground for impugning the second conviction. Lord Alverstone C.J. said : " In order to set aside the second conviction the applicant must show that the magistrate has done something on the previous hearing which either exhausted his jurisdiction to rehear or which made it unjust that the applicant should be put on her trial in regard to the offence charged. In my judgment the magistrate, finding out that upon the first hearing he had had before him evidence which was not admissible and had therefore not heard and determined the case according to law, was entitled in the exercise of his jurisdiction to have the case heard and tried before him on proper evidence." Pickford J. agreed, and Avory J., who laid stress on the view that in order to plead effectually *autrefois acquit* the defendant must have been legally acquitted, referred to a passage in Chitty on Criminal Law, 2nd ed., vol. i., at p. 463, where it is stated that

(1) [1912] 2 K. B. 362, 365.

the plea "will be of no avail when the first indictment was invalid, and when on that account no judgment could have been given, because the life of the defendant was never before in jeopardy."

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Applying these principles to this case the conclusion at which I have arrived is that when the appellant was tried on the indictment for the offence under the Betting Act, he never was in jeopardy of being convicted for an offence under the Licensing Act, and that the justices by committing the appellant for trial on the informations under the Licensing Act had not exhausted their jurisdiction and were therefore not precluded from subsequently adjudicating upon those informations.

The Court of Criminal Appeal has acted upon the same principle in cases in which a venire de novo has been awarded : see *Rex v. Wakefield*. (1)

The appeal therefore fails on both grounds, and must be dismissed.

SHEARMAN and SANKEY JJ. agreed.

Appeal dismissed.

Solicitors for appellant : *Peacock & Goddard, for Henry & Henry, Matlock.*

Solicitors for respondent : *Hamblins, Grammer & Co., for B. W. Moore, Derby.*

(1) [1918] 1 K. B. 216.

F. O. R.

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CURLING v. MATTHEY.

June 9, 23.

*Landlord and Tenant—Lease—Covenants to repair, insure and reinstate—
Breach—Impossibility of Performance—Prevention by Act of State.*

During the currency of a lease of a house and land, the competent military authorities acting under the powers conferred by the Defence of the Realm Regulations took possession of the demised premises and continued in occupation thereof until after the expiration of the term. The lease contained covenants, in the usual form, by the lessee, to repair, to deliver up in repair, to insure, and in the event of the demised buildings being damaged by fire at any time during the term forthwith to expend the insurance money in rebuilding. On February 12, 1919, the house was destroyed by fire. On March 25, 1919, the term expired by effluxion of time. In an action, commenced after that date, the lessor claimed damages from the lessee for breach of the above-mentioned covenants :—

Held, following *Whitehall Court v. Ettlinger* [1920] 1 K. B. 680, that the lessee had not been evicted by title paramount; but that the performance of the covenants had been rendered impossible by an act of State, and that the lessee was not liable.

ACTION tried by Bailhache J. without a jury.

By an indenture of lease dated March 25, 1898, the plaintiff demised to the defendant for a term of 21 years from that date a house and grounds known as Offley Holes House in the parish of Preston, Hertfordshire, at a yearly rent of 300*l.*

The lease contained covenants by the lessee (a) to pay the rent reserved; (b) "From time to time and at all times during the said term" to "repair uphold support maintain cleanse amend and keep" the demised premises; (c) at the expiration or sooner determination of the demise to surrender unto the lessor the demised premises well sufficiently and substantially repaired maintained etc.; (d) to insure and keep insured against loss or damage by fire all buildings at any time during the term upon the demised premises in the sum of 7000*l.*; (e) and "in case the premises or any part thereof shall at any time during the said term be destroyed or damaged by fire then" the lessee "will forthwith lay out all moneys to be received in respect of such insurance in rebuilding, repairing and reinstating the same."

In January, 1918, the Secretary of State for War acting by the competent Military Authority under the Defence of the Realm Regulations, after due notice, took possession of the demised premises for the purpose of housing German prisoners of war.

On February 12, 1919, the house was destroyed by fire.

On March 25, 1919, the term created by the lease expired by effluxion of time.

The military authorities remained in occupation of the premises until June, 1919.

The plaintiff claimed in this action the quarter's rent due on March 25, 1919, and damages for breaches of the above-mentioned covenants.

The defendant by his defence alleged that he had been evicted by title paramount, and that the performance of the covenants had become impossible by law. The defendant, further, relied on s. 1, sub-s. 2, of the Defence of the Realm Amendment, No. 2, Act, 1915 (5 Geo. 5, c. 37) ; and he counter-claimed for relief under s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1917 (7 & 8 Geo. 5, c. 25).

Douglas Hogg K.C. and *C. M. Pitman* for the plaintiff. The defence of eviction by title paramount was held in *Whitehall Court v. Ettlinger* (1) not to apply in circumstances which are identical with those of the present case. It is true that the defendant in that case did not raise the statutory defences which are relied on here, but they do not really affect the question. Delay in executing repairs caused by the military authorities being in possession of the demised premises might be excused under s. 1, sub-s. 2, of the Defence of the Realm (Amendment) No. 2, Act, 1915, but that section does not relieve the defendant from his liability on the covenants in the lease. With regard to the Courts (Emergency Powers) Act, 1917, s. 1, sub-s. 2, does not apply to this case. Sect. 2 might apply if this was a claim for forfeiture for breach of covenant, but it does not help the defendant, for the restriction having now been removed the defendant could only obtain relief

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upon the terms of paying the sum necessary to comply with the covenant, which is the amount claimed in this action. There is no defence to the action.

Leslie Scott K.C. and *Foà* for the defendant. *Whitehall Court v. Ettlinger* (1) cannot be distinguished from this case, but being a decision of a Court of co-ordinate jurisdiction it is not binding on this Court and should not be followed: *Attorney-General v. De Keyser's Royal Hotel*. (2) With regard to the liability of the defendant on the covenants to repair and to deliver up in repair, the obligation of a lessee in point of time is co-terminous with the term, and if up to the expiration of the term the lessee is prevented, as is the case here, by operation of law from performing the covenants, he is exonerated: *Baily v. De Crespigny* (3); *In re Shipton, Anderson & Co. and Harrison Brothers & Co.* (4) As to the covenant to lay out the insurance money in rebuilding, in the absence of express words, the liability under this covenant does not extend beyond the term. If demised premises are destroyed by a fire shortly before the expiration of a lease, and the lease contains no provision enabling the lessee to re-enter after the lease has come to an end, the lessee is not bound to reinstate: *Shaw v. Kay* (5); *Mills v. East London Union*. (6) The same principle applies where the lessee has been prevented during the term from rebuilding. This case comes within s. 1, sub-s. 2, of the Defence of the Realm (Amendment), No. 2, Act, 1915; but if the defendant is liable he is entitled to relief under the Courts (Emergency Powers) Act, 1917.

Pitman in reply. The Act of 1915 applies only to mercantile contracts. Relief will only be granted under the Act of 1917 upon the terms of the defendant paying damages, and that is what the plaintiff seeks to recover in this action. The rebuilding was not prevented by the occupation of the premises by the military authorities, but by the fact that when the fire occurred the lease was nearly at an end. The

(1) [1920] 1 K. B. 680.

(2) [1920] A. C. 508.

(3) (1869) L. R. 4 Q. B. 180.

(4) [1915] 3 K. B. 676.

(5) (1847) 1 Ex. 412.

(6) (1872) L. R. 8 C. P. 79.

language of the lease is clear that the defendant is liable to reinstate in the case of a fire causing damage at any time during the term.

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Cur. adv. vult.

June 22. BAILHACHE J. read the following judgment. The plaintiff is the lessor of a house known as Offley Holes, near Hitchin, and he sues the defendant as lessee under a lease dated March 25, 1898, for a term which expired on March 25, 1919. The action is for the last quarter's rent and for damages for breach of the insurance covenant or of the covenant to yield up the premises at the expiration of the term in good repair or both.

The dispute arises out of the following facts. In February, 1918, H.M. Secretary of State for War acting through the appropriate military authorities required the house for the internment of prisoners of war and insisted upon the tenant quitting the premises. This he was reluctantly obliged to do. In February, 1919, the house was destroyed by fire. At the expiration of the term the military authorities were still in possession, and they did not give up possession until the following June. Nothing had been done by that time to rebuild the house.

The lessee paid his rent down to Christmas, 1918, but claims to be relieved from payment of the last quarter's rent and from his obligations under both of the covenants referred to upon these grounds: (1.) That he was evicted by title paramount and the lease thereby determined; (2) frustration of the purposes for which the lease was granted; (3) prevention by the lawful acts of the military authorities. The defendant also claims relief under s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1917.

The first two grounds are disposed of in a sense adverse to the defendant by the decision of the Lord Chief Justice in *Whitehall Court v. Ettlinger* (1), a decision which I feel I ought to follow without expressing any view of my own, but I note that in this case the lessee did not regard himself as

(1) [1920] 1 K. B. 680.

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having been evicted by title paramount, as he continued to pay his rent for some considerable time after he had been turned out of the house.

The covenants to yield up the premises in good repair and to insure are in the usual form. The latter requires the lessee to insure in the joint names, to rebuild after a fire, applying the insurance moneys to that purpose and paying any extra cost himself. It is unnecessary to decide whether the lessee could be compelled to rebuild after a fire occurring so near the end of his term, because apart from the special circumstances of this case, he would clearly be liable in damages for breach of the covenant to yield up the premises in good repair, and the damages would be the cost of rebuilding.

Assuming then that there was no eviction and no frustration, the question must be, Was the lessee prevented from performing his covenant to pay rent and his covenant to yield up the premises in good repair, and is such prevention an excuse for non-performance? It is obvious that the occupation by the military authorities did not prevent performance of his covenant to pay rent. He could, and did, continue to pay rent after his house was requisitioned, and the quarter's rent sued for must be paid. It is equally obvious that he was in fact prevented from yielding up the premises at the end of his term either in good repair or at all.

It remains to consider whether he was thereby relieved of liability for non-performance of that covenant. That depends, I think, upon the nature of the prevention. If the prevention here was merely a supervening physical impossibility, as at first sight might appear, the general rule still is that such impossibility is no excuse for non-performance of a contractual obligation. I say "still is," because although the strictness of the old rule has been to some extent relaxed, yet I think in considering the question in any given case one must start from the standpoint of the old authorities. When, however, one considers the circumstances more closely, it is seen that the impossibility in this case, although one of fact, was brought about by the lawful act of the Secretary of State for War acting under the powers conferred upon him by the War Emergency

Legislation, and his requisition of the lessee's house and its occupation for the internment of prisoners of war were together equivalent, in my opinion, to an act of State, and an act of State excuses the non-performance of a covenant whose performance it prevents.

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I have had great doubt whether this case does not come within s. 2 of the Courts (Emergency Powers) Act, 1917, but I think not. That section applies to acts done or abstained from in obedience to some emergency act or regulation directing the doing or omission of the act, and does not in terms apply to prevention by acquisition and user of premises on behalf of the Crown, and is in this respect in marked contrast with sub-s. 2 of s. 1 of the same Act.

Taking the view I do, it is unnecessary to consider the defendant's counterclaim for relief.

The plaintiff must have judgment for his quarter's rent, but upon the main question, that of liability to rebuild or to yield up the premises in good repair, the action fails.

Judgment accordingly.

Solicitors for plaintiff: *Corbould, Rigby & Co.*

Solicitor for defendant: *C. G. W. Ogilvie.*

F. O. R.

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[IN THE COURT OF APPEAL.]

1920

July 15.

FISHER, REEVES AND COMPANY, LIMITED *v.* ARMOUR
AND COMPANY, LIMITED.

[1920. F. 215.]

Sale of Goods—"Ex store" Rotterdam—Congested Port—Goods in Lighters.

Two firms agreed the one to sell and the other to buy certain cases of tinned meat "ex store Rotterdam." The goods had arrived in Rotterdam some months previously consigned to the seller's agents, and had been landed on to a quay, but owing to the congested state of the port there was no room for them in any warehouse and they had to be stored in lighters, where they were at and after the date of the contract:—

Held, that goods so stored could not be correctly described as sold "ex store," and that the buyers were entitled to repudiate the contract.

Judgment of Bailhache J. [1920] 2 K. B. 329 reversed.

APPEAL from the judgment of Bailhache J. (1)

The defendants were a joint stock company registered in the United Kingdom under the Companies Acts and carrying on business in London. They were a branch of a large undertaking of Armour & Co. of Chicago, packers and exporters of meat. Another branch of the same undertaking was incorporated under the Dutch law in Rotterdam. The branches, although independent, acted occasionally as agents one for the other.

In July, 1919, the defendants had a parcel of 7573 cases of boiled beef which they had purchased in South America and consigned on board the steamship *Sheridan* to the Rotterdam branch. During the latter half of the year 1919 the port of Rotterdam was much congested. Great quantities of goods had been consigned to the port in expectation of demands from Germany. This expectation was not fulfilled, and consequently there was more merchandise in the port than the warehouses could accommodate. There were lying in the port lighters of very large capacity used for the transport of goods on the Rhine, and much of the merchan-

(1) [1920] 2 K. B. 329.

dise in the port of Rotterdam was stored in these lighters for want of room elsewhere. The goods in question had arrived at Rotterdam on board the *Sheridan* in July and had been landed on to a quay, but were afterwards stored in lighters as the Rotterdam branch could find no space for them in any of the warehouses.

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On November 4, the plaintiffs, a firm of merchants in London, wanted to buy 500 cases of boiled beef. Their manager, Mr. W. J. Woodward, applied to the defendants' manager, Mr. S. Herbert, who agreed to sell subject to confirmation 500 cases out of the stock at Rotterdam. Thereupon the following correspondence passed between the parties :—

On November 4 the plaintiffs wrote to the defendants :
“We beg to confirm purchase of 500 cases . . . South American boiled beef, spot Rotterdam, at 22.25 dollars per case. We shall be glad to have your confirmation of this transaction in due course.” On November 12 the defendants wrote : “We beg to enclose herewith invoice in respect of your purchase of 500 cases South American boiled beef, and shall be pleased to exchange delivery order for these goods for your cheque for the amount shown on the accompanying invoice.” The plaintiffs, who intended to sell these 500 cases to third persons, wanted to know whether the goods were in transit or not, because at this time if goods were not in transit, but had reached their destination in Holland, they could not be removed without a special permission from the Dutch Government. Accordingly W. J. Woodward called at the defendant's office and inquired whether the goods were in transit or not. On November 14 the defendants wrote to the plaintiffs : “Referring to your call on us this afternoon in reference to the 500 cases . . . boiled beef which you recently bought from us ex store Rotterdam, this is to advise you that the goods in question were shipped to Rotterdam in transit. You should therefore experience no difficulty in moving them to another point.”

The plaintiffs paid 2500*l.* on account for the goods and obtained a delivery order. On December 5 and 12 the

C. A. defendants wrote asking for the balance of 179*l.* 2*s.* 2*d.* and
1920 referring to the sale and purchase of "500 cases . . . boiled
beef ex Rotterdam." On December 13 one H. Arnois, the
FISHER, manager of the Rotterdam branch of Armour & Co., wrote
REEVES, to the plaintiffs' representatives at the same port: "We are
& Co. sorry to inform you that we could not arrange for an inspection
v. to-day of the canned meat we sold to your London house,
ARMOUR as the goods are only discharged in the course of this day
& Co. ex lighter on quay, and we cannot arrange for getting a custom
house official for to-day." On the same day he wrote to the
defendants in London: "We had yesterday the visit of
Mr. Woodward, representative of the Fisher, Reeves Co., Ltd.,
London, to whom you sold some time ago 500 cases of our
boiled beef ex s.s. *Sheridan*. Mr. Woodward requested us to
have an inspection made of ten per cent. of the quantity sold
and we understand . . . that this is customary in London. As
the goods have been on lighters so far an inspection of the goods
within the next few days was excluded, because we need
the presence of a custom house official and cannot arrange
this in less than three or four days when the goods are on
lighters. We had however been able to arrange before the
visit of Mr. Woodward that the goods would be discharged
from lighters into a warehouse and the unloading is expected
to start to-day. We consequently told Mr. Woodward that
we would be able to arrange for inspection for Monday or
Tuesday in the coming week. . . ." The letter went on to
say that Mr. Woodward asked for a statement in writing that
the goods could not be inspected being in lighters, and that
in the writer's opinion Mr. Woodward wanted to find a pre-
text for cancelling the sale. On December 15 the defendants
telegraphed to their agent: "Your letter 13th. Have 500
boxes boiled we sold Fisher & Reeves immediately transferred
to warehouse. Sale was not subject ten per cent. inspection,
therefore decline examination." On December 16 the
plaintiffs wrote to the defendants: "With reference to the
500 cases . . . South American boiled beef which we purchased
from you on November 12 ex store Rotterdam, our
Mr. Woodward called at your Rotterdam branch on Friday,

December 12, 1919, to arrange for the inspection of these goods, and found that the same were not in store but lying in lighters on the river. The goods not being available your contract cannot stand, as you sold these goods to us ex store Rotterdam and explicitly stated . . . in your letter of November 14 [that they] were in store at Rotterdam. We therefore request you to return at once to us our payment on account 2500*l.* in exchange for delivery order which we now hold." After various other letters had passed between the parties the defendants on December 29 wrote to the plaintiffs: "We would suggest to you that for some time at Rotterdam as well as other Continental ports and even at London lighters have been used as stores because of the shortage of warehouse space. The goods in this case could have been delivered to you promptly if you had presented your delivery order."

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On February 10, 1920, the plaintiffs issued a writ against the defendants claiming 2500*l.* and other sums for insurance and damages. In their statement of claim they alleged: (para. 1) That by a verbal contract made on November 4, 1919, between one W. J. Woodward as agent for the plaintiffs and one S. Herbert as agent for the defendants, the defendants agreed to sell to the plaintiffs 500 cases of South American boiled beef lying in store at Rotterdam at 22.25 dollars per case, and that the contract was confirmed by letters from the defendants, the first dated November 12, inclosing an invoice dated November 8, and the other dated November 14, 1919; (para. 2) that it was a condition of the contract, and that the defendants by their agent warranted that the goods were then lying in a store or warehouse at Rotterdam; (para. 3) that relying on that condition and on the warranty of the defendants given by their agent Herbert, the plaintiffs paid 2500*l.* and received a delivery order for the goods; (para. 5) that on or about December 12, 1919, it came to the plaintiffs' knowledge through their agent, W. J. Woodward, who was then in Rotterdam, that the goods were not in store but were in lighters; and (para. 6) that by reason of the premises the plaintiffs became and were entitled to repudiate

C. A. the contract, which they did by letter dated December 16,
1920 1919, to the defendants.

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The defendants admitted that a contract was made on November 4 between W. J. Woodward on behalf of the plaintiffs and S. Herbert on behalf of the defendants, but alleged that by that contract the defendants agreed to sell and the plaintiffs agreed to buy 500 cases of South American boiled beef spot Rotterdam, and not "lying in store," as alleged by the plaintiffs. They alleged that this contract was confirmed by the plaintiffs' letter of November 4, and they admitted and referred to the letters of November 12 and 14 and the invoice of November 8. They counterclaimed 17*l.* 2*s.* 2*d.* the balance of the contract price.

In addition to the facts stated above it appeared from the evidence that the general condition of the port of Rotterdam was known to the plaintiffs at the date of the contract. A witness called for the plaintiffs stated that goods in a lighter or a ship could not be described as "ex store," and that "store" meant a public or private warehouse. Bailhache J. found as a fact that the plaintiffs' agent, W. J. Woodward, had tried to sell the goods and had asked H. Arnois, the defendants' agent at Rotterdam, to sell them for him after he had learnt that they were not in a store but in lighters. The learned judge held that the words "ex store" were applicable to goods stored in lighters, and gave judgment for the defendants.

The plaintiffs appealed.

Patrick Hastings K.C. and *Jowitt* for the appellants. The judgment of Bailhache J. ought to be reversed. The expression "ex store" may not be synonymous with "ex warehouse"; but both are common commercial terms and mean much the same thing. They both indicate goods on land and not afloat. Any one who would attribute to a common expression a meaning other than its usual meaning must show that the other party understood it in the same sense. Whatever the appellants may have known of the state of the port of Rotterdam they did not know that goods

were being stored in lighters and sold as ex store. The judgment of Bailhache J. has come as a great surprise to the London Chamber of Commerce.

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Stuart Bevan K.C. and *H. Claughton Scott* for the respondents. The London Chamber of Commerce has mistaken the effect of the judgment. The learned judge never meant to hold that as a general proposition "ex store" means "ex lighter," but that in the special circumstances of this case the goods happened to be stored in lighters owing to the condition of the port which was known to the appellants. In this contract the expression "ex store" was meant to show that the goods were not sold ex steamship *Sheridan* or ex ship.

[BANKES L.J. If the goods had been removed from the quay and replaced on board the *Sheridan* could they have been properly sold "ex store" ?]

In certain circumstances they might.

[SCRUTTON L.J. Would an insurance of goods in store, a land risk, cover goods in a lighter, a marine risk ?]

The answer depends on the nature of the goods and the nature of the store. Explosives are often stored in hulks in the river. "Ex store" is not the same as "ex warehouse." The meaning of "ex store" varies in different ports as well as with the kind of goods stored.

Secondly, the contract was not for goods ex store. The words used in the appellants' letter of November 4 were "500 cases . . . South American boiled beef spot Rotterdam," and the respondents' letter of November 12 says nothing of goods ex store. In the view which Bailhache J. took it was not necessary to decide whether the sale was ex store or not, and he did not decide the question.

Thirdly, by attempting to resell the goods after learning that they were stored in lighters, the appellants waived any right they might have had to repudiate the contract.

Counsel for the appellants were not called upon to reply.

BANKES L.J. The judgment of Bailhache J. has been taken as defining generally the meaning of the words "ex store"

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as applied to goods the subject of a sale, and we are told that merchants regard that judgment as disturbing the course of business, because it is not in accordance with the generally accepted meaning of those words. The judgment was not so intended, and Mr. Bevan does not defend it as a judgment of general application; but he says that in the peculiar circumstances of this case the learned judge came to the right conclusion.

Two questions were raised on this appeal: first, whether the contract was one for the sale of goods "ex store"; secondly, assuming that it was, what is the meaning of that expression in this particular contract? The appellants in their pleading alleged a verbal contract made on November 4, 1919; the respondents admitted a verbal contract; and both parties pleaded that the contract was confirmed by letters which passed between them. In truth the correspondence does not confirm the verbal contract alleged by the appellants, but it is common ground that the contract was made verbally between Mr. Woodward as agent for the appellants and Mr. Herbert as agent for the respondents, and its terms have therefore to be gathered from the evidence of those two persons, both of whom were called as witnesses and each of whom had an opportunity of stating what the contract was. Mr. Woodward says it was a contract for the purchase and sale of a quantity of boiled beef "ex store Rotterdam." Mr. Herbert does not dispute this; in his letter of November 14 he spontaneously describes the contract as a purchase by the plaintiffs "ex store Rotterdam." Upon this question Bailhache J. does not express a very clear opinion; in the view he took it was not necessary to decide the question, and he was content to take the contract as one for the purchase of goods "ex store Rotterdam." I have no hesitation in saying that the contract was for the purchase of goods "ex store Rotterdam."

Then what is the meaning of "ex store" apart from special circumstances? It is easier to say what is not "ex store" than to give a complete definition of what is "ex store." I should say most decidedly that goods ex lighter or goods

ex wharf are not goods "ex store." That seems to be also the defendants' view. Their sales manager said "We always offer our goods ex quay and/or warehouse and/or lighter," for the reason, surely, that each was to be distinguished from the others. Mr. Bevan contended that the judgment of Bailhache J. was not to be treated as one of general application but as having reference to the particular facts of this case and that under the conditions prevailing in the port of Antwerp these goods might properly be described as "ex store." I could understand the view of the learned judge if the appellants knew that goods of this kind were being stored in all sorts of places which could not ordinarily be described as stores, and entered into this contract to buy goods ex store knowing that the goods might be in a lighter or in a ship or under a shed ; but there is no evidence that the appellants knew this, and I do not read the judgment as based upon any inference that they did. If a person sells goods to another and uses an expression well known to have a special meaning among business men, he will be bound by that meaning unless he gives evidence that he told his purchasers, or that they knew without his telling them, that the expression was being used in a special sense. There is nothing in this case to suggest that the words were being used with any but their ordinary meaning and they must be read in their generally accepted sense. A witness having special knowledge was called to say what that sense was ; he said that goods in a lighter or in a ship could not properly be described as "ex store," and went on to say "a store is a public or private warehouse." The learned judge differed with this definition. I think myself it is unwise to attempt a definition of a store ; stores must vary greatly in size, capacity, and description according to the place where they are situate and the goods they are intended to hold ; and therefore I am content to accept the other part of the witness's evidence, which accords with my own experience, where he said "goods in a lighter or ship cannot be described as 'ex store.'"

For these reasons I think the appellants are right in saying that these goods, which at the time of the sale were in lighters,

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could not properly be described as sold ex store, and that they were justified in repudiating the bargain and insisting on repayment of the purchase price which they had paid. The appeal must be allowed; judgment must be entered for the appellants, and the counterclaim will be dismissed.

SCRUTTON L.J. I am of the same opinion. The first question is whether the contract between the parties included a contractual description of the goods as "ex store." It seems clear to me on the evidence that this was the agreement. It was an oral agreement. If it had been necessary to consider whether there was a memorandum in writing of that agreement to satisfy s. 17 of the Statute of Frauds or s. 4 of the Sale of Goods Act, 1893, the letter of November 14 signed by the respondents would have been sufficient, inasmuch as it contained the description "ex store" and a reference to "the 500 cases . . . boiled beef which you recently bought from us," which would have let in oral evidence of the other terms of the contract. That letter signed by the respondents coupled with the telegram they sent on December 15 strongly confirm my view. I start therefore with a contract for the sale of goods "ex store."

The next question is whether generally, which Mr. Bevan does not assert, or in the special circumstances of the port of Rotterdam at this time, goods lying afloat in a lighter can be described as "ex store." I am not quite clear whether the learned judge meant to decide this question in view of the special circumstances of the port or on the general meaning of the word "store." If he founded his decision on this latter ground I should both on the evidence and from my own experience disagree with the opinion that "ex store" could cover "ex lighter" or "ex quay." When goods in a lighter are insured the risk is a marine risk. If they are in a store the risk is, in my view, a land risk. I do not propose a definition of the word "store" which will cover all its meanings whatever be the trade or the port in question. The meaning varies with the subject-matter and its surroundings. Personally I have no doubt that, applied to frozen meat,

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"ex store" means ex refrigerating store and that a vendor who having sold frozen meat ex store tendered meat off the quay would be quickly brought to his senses by the purchaser or any one else in the trade to whom he tendered it. "Store" in various ports may have different meanings; but one thing is clear, that in general "ex store" indicates storage on land. Mr. Bevan indeed did not argue that as a general proposition "ex store" would point to a marine risk in a lighter afloat; he has contended that it was generally known that there was congestion in the port of Rotterdam and that anybody purchasing "ex store" must be taken to know that in a time of congestion goods may be stored in all sorts of odd places, and that any of these places may be a store in time of congestion. I asked whether the same wide meaning might be given to the word "warehouse" in time of congestion and whether goods in any of these odd places might be described as sold ex warehouse. Mr. Bevan thought that would be carrying the doctrine of congestion a little too far in its effect upon the meaning of the English language. I think the same strain is put upon the language when the word "store" is made to include any place where goods may happen to be in time of congestion. The evidence of the appellants' knowledge of the actual facts only amounts to this, that they knew the port was congested but knew nothing about lighters being used for storing the goods. When a seller in describing the goods to be sold uses an ordinary commercial term in a sense outside and beyond its ordinary meaning he must make it clear to the buyer that he is selling him something other than that which the term used would ordinarily convey. In my opinion therefore, whether the word "store" can only be read in its ordinary sense, or whether some peculiar meaning might be given to it in view of the congested state of the port of Rotterdam at the time, the goods were not "ex store" within the meaning of this contract and the appellants were entitled to reject them, the description being a condition precedent of great commercial importance.

Thirdly, it was contended, though not pleaded, that the

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appellants had lost the right to reject; because with knowledge of the facts they took action inconsistent with that right. When one party to a contract becomes aware of a breach of a condition precedent by the other he is entitled to a reasonable time to consider what he will do, and failure to reject at once does not prejudice his right to reject if he exercises it within a reasonable time. In my view he is also entitled during that reasonable time to make inquiries as to the commercial possibilities in order to decide what to do on learning for the first time of the breach of condition which would entitle him to reject. I cannot see that the appellants did anything beyond making inquiries in order to decide what they should do. Therefore if this matter had been pleaded it would not have afforded a defence. For these reasons I think the appeal should be allowed.

EVE J. I agree. I think the contract was clearly a contract to sell "ex store" at Rotterdam, which in my view, in the absence of special circumstances affecting the conclusion of the contract, is synonymous with "ex warehouse." The primary meaning of each expression seems to me to be a place for the storage of goods or wares. In this case I see no special circumstances warranting us in attributing to the expression "ex store" the meaning for which the respondents contend.

The further point, that the right to reject had been lost, not having been raised on the pleadings, ought not in my opinion to have been entertained; but even if entertained it does not afford a defence.

Appeal allowed.

Solicitors for appellants : *Cosmo Cran & Co.*

Solicitors for respondents : *W. A. Crump & Son.*

W. H. G.

In re LAVEY.

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July 27.

Ex parte COHEN AND COHEN.

Costs—Taxation—Trustee in Bankruptcy—Motion to which Bankrupt's Wife Respondent—Order that Wife account on Oath for Furniture—Provision for Valuation as Indulgence to Wife—Valuer's Fee—Costs of working out Order.

Upon a motion by a trustee in bankruptcy to which the bankrupt's wife was respondent a declaration was made that certain furniture which was upon premises occupied by the bankrupt and his wife formed part of the property of the bankrupt divisible among the creditors, and the Court ordered the wife to account on oath before a registrar for the furniture and to pay the taxed costs of and incident to the motion. At the end of the declaration and order a provision was inserted, at the request of, and by way of indulgence to, the wife that, with a view to the furniture being bought by or on behalf of the wife from the trustee at a valuation by an independent valuer to be appointed by the parties or in case of difference to be appointed by the judge, and the wife undertaking not to part with or dispose of the furniture, execution should not issue except by leave of the judge. The furniture was valued by a firm of valuers selected by the wife out of three firms suggested by the trustee, and bought by or on behalf of the wife at a price based upon the valuation. Upon the taxation of the trustee's solicitors' bill of costs, the taxing Master disallowed as against the wife the fee paid by the trustee to the firm of valuers, upon the ground that the costs relating to the purchase of the furniture by or on behalf of the wife under the valuation did not come within the order, and were not costs of carrying it out. On a motion by the solicitors to review the taxation :—

Held, that the taxation must be reviewed and the fee for the valuation allowed as against the wife, inasmuch as it formed part of the costs of carrying out the order and was therefore within the rule enunciated by Mellish L.J. in *Krehl v. Park* (1875) L. R. 10 Ch. 334, 339, that "where costs of suit are given generally by decree at the hearing, the subsequent costs of working out the directions of the decree will be included."

MOTION on behalf of the applicants, Messrs. Cohen & Cohen, solicitors for the trustee in bankruptcy of the estate of the bankrupt Lavey for an order that the taxation of a taxing Master in bankruptcy of their bill of costs on a motion brought by the trustee against the bankrupt's wife (taxed under an order of February 10, 1919) be reviewed and that the applicants' objections dated January 5, 1920, to the

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disallowance of the several items specified in the objections be allowed and the items allowed, and that the costs of and occasioned by the application and relating to the objections be taxed and paid by the respondent, Mrs. Lavey, to the applicants. The notice of motion was dated May 21, 1920, and was addressed to the taxing Master in bankruptcy, and to the respondent and Messrs. Langford & Redfern, her solicitors.

The motion by the trustee against Mrs. Lavey upon which the order of February 10, 1919, was made was heard on February 3 and 10, 1919. By his notice of motion the trustee asked for: A declaration that the furniture and effects now or lately at 36, Holland Villas Road, Kensington, in the occupation of the respondent the wife of the bankrupt and of the bankrupt formed part of the property of the bankrupt divisible among the creditors and that an alleged sale thereof by the bankrupt to the respondent in July, 1915, was a sham and a device for protecting the furniture against the claims of the bankrupt's creditors.

Alternatively a declaration that certain receipts given by the bankrupt to the respondent and dated respectively July 21, 1915, August 29, October 24, November 2 and November 6, 1916, or some or one of them were or was a bill of sale of the furniture and were void under the provisions of the Bills of Sale Acts, 1878 and 1882.

An order that the respondent do account on oath for the furniture comprised in the alleged sale and receipts which has come to her hands and do deliver to the applicant the same and pay to him the value of such part if any of the same as she may have disposed of.

An order that all necessary accounts and inquiries be taken and made.

An order on the respondent to pay to the applicant the costs of and occasioned by this application.

At the hearing of the motion (which took place before Horridge J.) Clayton K.C. and Hansell appeared for the trustee and Givven for Mrs. Lavey, and the learned judge having decided that the furniture formed part of the property

of the bankrupt divisible among the creditors and belonged to the trustee, a discussion took place as to that part of the notice of motion which asked for an account of the furniture comprised in the alleged sale and receipts which had come to Mrs. Lavey's hands and for an order that she should deliver to the trustee the same and pay to him the value of such part of it as she might have disposed of. The discussion was in substance as follows :—

Given. This furniture is being used in the house by the lady and at present forms her home. There is a possibility of somebody coming forward to buy it now that your Lordship has decided it is the trustee's. I do not know if you could make any suggestion or form of order that it might be valued by an independent valuer and bought at his valuation. I do not ask for my own value or valuer. It seems at the present time with the difficulties of transit and auction it might be better if it were done in that way. I am asked to make the application.

HORRIDGE J. That seems a reasonable suggestion. The trustee does not want a lot of furniture.

Clayton K.C. As long as it is some good independent person I do not mind. The proper thing is that the trustee should sell it to her as a matter of bargain, and he cannot get more than it is worth.

HORRIDGE J. I think the better way of settling the price is to have an independent valuer. Would not the best plan be if I were to say this order is not to be enforced by execution on her undertaking not to part with the furniture, and Mr. Clayton, on behalf of the trustee, undertaking not to enforce the order by execution without reference to me?

Clayton K.C. That is done with a view to enable the lady to find the money to protect her home.

Given. I suggest it might be done by leaving it to an independent valuer.

Clayton K.C. That will not prevent us going at once to make an inventory.

HORRIDGE J. You must have that.

Given. We cannot possibly object to that.

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HORRIDGE J. There will be no execution on the order without my leave.

Clayton K.C. Mrs. Lavey gives an undertaking not to part with the furniture in the meantime, and we can make an inventory at once.

HORRIDGE J. Yes.

Clayton K.C. I ask for the costs of the application.

HORRIDGE J. Yes.

The declaration and order made by Horridge J. as drawn up by the Registrar was as follows :—

“ This court doth declare that certain receipts given by the bankrupt to the respondent and dated respectively July 21, 1915, August 29, October 24, November 2 and November 6, 1916, or some or one of them were or was a bill of sale of the furniture and effects now or lately at 36, Holland Villas Road, Kensington, in the occupation of the respondent and the bankrupt and are void under the provisions of the Bills of Sale Acts, 1878 and 1882. And this court doth further declare that the said furniture and the effects form part of the property of the bankrupt divisible among the creditors and belong to the applicant as trustee.

“ And this Court doth order that the respondent do account on oath before one of the registrars of the court for the said furniture and effects comprised in the said receipts which have come to her hands and do deliver to the applicant the same and pay to him the value of such part if any of the same as she may have disposed of.

“ And this court doth further order that the applicant's costs of and incident to this motion be taxed by the taxing master of this court and the amount thereof when so taxed be paid by the respondent to the applicant or to his solicitors Messrs. Cohen & Cohen of 2, Finsbury Circus, E.C. 2.

“ And it is further ordered with a view to the said furniture and effects being bought by or on behalf of the respondent from the applicant at a valuation by an independent valuer to be appointed by the parties or in case of difference to be appointed by the judge and the respondent undertaking not to part with or dispose of the said furniture or effects or

any of them execution hereon do not issue except by leave of the judge but the applicant is to be at liberty to have an inventory of the said furniture and effects taken on his behalf forthwith."

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On March 6, 1919, Messrs. Cohen & Cohen, the applicants in the present motion, wrote a letter to Messrs. Langford & Redfern, the solicitors for Mrs. Lavey, a letter, the material part of which was as follows: "Our client, the trustee, instructs us to suggest that you should approve the appointment as valuer, a member of one of the following three firms—namely, Messrs. Phillips, Son & Neal, Knight Frank & Rutley or Messrs. Hampton." In reply Langford & Redfern sent the following letter, dated March 11, 1919, to the applicants: "Our client agrees to the question of the valuation being referred to Messrs. Knight Frank & Rutley." To which the applicants replied by a letter dated March 13, 1919, acknowledging receipt of the letter of March 11 and saying they had informed the trustee of its contents.

Messrs. Knight Frank & Rutley accordingly valued the furniture and the trustee paid them their fee of 40*l.* 10*s.* 4*d.*

The applicants' bill of costs in the motion brought by the trustee against Mrs. Lavey was duly taxed under the order of February 10, 1919. Upon the taxation the taxing Master disallowed the fee of 40*l.* 10*s.* 4*d.* paid to Knight Frank & Rutley and sums of 3*s.* 6*d.* for each letter dated March 6 and 13 upon the grounds appearing in his following answer to the applicants' objection to the disallowances. He also, on the same grounds, disallowed other items for letters written by the applicants to the trustee and Langford & Redfern, and for certain attendances.

The applicants' objection to the taxation was lodged with the taxing Master and the reason for the objection and the Master's answer thereto were as follows:—

Applicants' reason for objection: "The reason for the objection to the disallowance of these items is the same, as all these items relate to the purchase by or on behalf of the respondent of the furniture under a valuation pursuant to the terms of the order of the judge of the 10th February, 1919.

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It is submitted on the authority of *Krehl v. Park* (1) that costs of the order include subsequent costs of working same out. This sale of the furniture was effected pursuant to the terms of the order and therefore it is submitted that the costs relating thereto are costs of working out the order. In this case the provision in the order actually fructified in a sale for 900*l.* or thereabouts. Moreover in this particular case if it had not been for the decision in *Krehl v. Park* (1) it is confidently submitted that the learned judge would have made a special order for these costs to be paid because it was a concession which was being asked by the respondent and accorded willingly by the trustee in the bankruptcy in order to save the home for the respondent. After the learned judge had decided in favour of the trustee counsel for the respondent asked as a favour that there should be a concession made with the object of enabling the furniture to be purchased by or on behalf of the respondent. The trustee at once acceded and the learned judge stated he would make it part of the order and settle the terms providing for an independent valuer. It will therefore be most unreasonable and unfair for the costs relating to this valuation, made by a leading firm selected by the respondent's solicitors, to fall on the trustee in the bankruptcy. The learned judge no doubt in making the provision for this sale part of the order had in his mind the fact that by so doing the expense relating thereto would, in accordance with the decision in *Krehl v. Park* (1), fall upon the respondent and not upon the trustee for the creditors."

Master's answer: "Broadly speaking I do not consider that any of the costs relating to the purchase by or on behalf of the respondent of the furniture under a valuation come within the four corners of the order. Nor do I think that the point is governed by the case of *Krehl v. Park* (1) referred to. In that case the carrying out of the inquiry was really a part of the decretal order and was of the essence of the proceedings and on that basis I have already allowed the costs of the inquiry before the registrar (when Mrs. Lavey, the respondent,

had to account for the furniture) as being the real 'costs of carrying out the order.' In my opinion the costs covered by the order of February 10, 1919, are confined to the costs of proving the trustee applicant's title to the furniture and the mere fact that the order provides for a sale for the convenience of the parties under certain conditions does not impose a liability on the respondent to pay the costs and expenses of that sale as between party and party. The sale had nothing to do with the declaration asked for in the notice of motion and had nothing to do with the applicant's title to this furniture. It may also be noted that the provision for the sale in the order is inserted at the very end of the order (as a sort of addendum) after the paragraph dealing with the costs of the motion to be taxed. Whether the provision in the order 'fructified in a sale for 900*l.*' or not is in my opinion quite immaterial, nor do I know whether the judge intended the applicant to have these costs as against the respondent relying on *Krehl v. Park* (1), but there is nothing in the order to justify this inference, and the mere fact that a concession (as it is called to the objection) was granted to the respondent to enable her to purchase the furniture does not make her liable to pay the costs and expenses of the sale without express directions in the order."

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E. W. Hansell for the applicants. If it had not been for the last paragraph in the order of February 10, 1919, execution would have issued, but in consequence of the statement made by *Giveen* on behalf of Mrs. Lavey that he wished for a valuation of the furniture the last paragraph was included in the order and execution was stayed. The valuer was chosen by Mrs. Lavey. The inclusion of the provision for the valuation in the order took place at the request of Mrs. Lavey the respondent to the motion upon which the order was made and the trustee ought not to pay the costs of it. It was also a necessary expense of carrying out the order.

N. L. Macaskie for the respondent, Mrs. Lavey. The title

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to the furniture was the sole question in dispute in the motion on which the order of February 10, 1919, was made, and it was held that the trustee was entitled to it. The provision in the order that a valuer should be appointed has nothing to do with working out the order and therefore the fee charged for making the valuation ought not to be allowed as against Mrs. Lavey according to the rule laid down by Mellish L.J. in *Krehl v. Park*: (1) Mrs. Lavey ought not to be in a different position from any other purchaser. The costs of the valuation have nothing to do with the respondent accounting on oath before the registrar for the furniture.

HORRIDGE J. Mr. Macaskie has placed before the Court quite clearly the point he raises on behalf of the respondent, Mrs. Lavey, but, in my opinion, these costs are costs incurred in working out the order. It is quite true that if the order had merely been made in the ordinary form, and the trustee had obtained the furniture, he could have dealt with it as he chose, and would have had to pay any costs of realization; but, in that case, realization would have been no portion of the order. In the present case Mrs. Lavey asked for indulgence, and that indulgence was included in the order itself. It is therefore quite clear that carrying out that portion of the order was working out the order within the language of Mellish L.J. in *Krehl v. Park* (2), where he said: "The rule which appears to be established is, that where costs of suit are given generally by the decree at the hearing, the subsequent costs of working out the directions of the decree will be included." The taxation must therefore be varied and these items will be allowed.

Taxation varied.

Solicitors for applicants: *Cohen & Cohen.*

Solicitors for respondent, Mrs. Lavey: *Langford & Redfern.*

(1) L. R. 10 Ch. 334.

(2) L. R. 10 Ch. 334, 339.

J. E. A.

[IN THE COURT OF APPEAL.]

ASTOR *v.* BARRETT AND ANOTHER.

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July 29.

County Court—Practice—Trial before Judge alone—Misdirection—New Trial—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 93.

By s. 93 of the County Courts Act, 1888, "Every judgment and order of the Court, except as in this Act provided, shall be final and conclusive between the parties. . . . The judge shall also in every case whatever have the power, if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable."

A county court judge, in an action against joint tortfeasors tried without a jury, assessed the damages separately against the defendants and gave judgment against them severally. Being subsequently convinced that he had made a mistake he ordered a new trial:—

Held, that he had jurisdiction to do this, inasmuch as the correction of the mistake did not involve reversing the judgment and entering judgment for the defendants.

Clarke v. West Ham Corporation [1914] 2 K. B. 448 distinguished. *Principle of Sanatorium, Ltd. v. Marshall* [1916] 2 K. B. 57 applied.

Decision of Divisional Court, ante, p. 13, reversed.

APPEAL from a Divisional Court. (1)

The defendant, Mrs. Barrett, in March, 1919, let a furnished house at Blackpool to the plaintiff for a year. Before the end of the term—namely, in November, 1919—she desired to get rid of the plaintiff as tenant. She asked the defendant Hulme to assist her in so doing and suggested to him that he might take two men with him. Accordingly on November 22, 1919, the defendant Hulme with two men entered the house pretending to be a bailiff with a warrant for ejecting the plaintiff by force. No ejectment order had in fact been applied for or obtained.

The plaintiff brought an action in the county court. The particulars of claim were as follows: "On Saturday, November 22, 1919, the male defendant (Hulme) wrongfully entered the plaintiff's dwelling-house, No. 10, Grosvenor Street, Blackpool aforesaid during the plaintiff's absence, under the pretext that an order of ejectment had been obtained by the female defendant (Mrs. Barrett) from the justices of

(1) Ante, p. 13.

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Blackpool to eject the plaintiff from the said dwelling-house whereas in truth and in fact no such ejectment order had been obtained or applied for. The male defendant threatened to eject from the said house the plaintiff and his goods and belongings. The plaintiff claims damages for this trespass against the female defendant and male defendant. Alternatively the plaintiff's claim is against the male defendant for the acts of trespass before mentioned. The plaintiff claims damages 50*l*."

At the hearing in the county court on January 28, 1920, counsel for the defendant Mrs. Barrett admitted that she was liable for the initial entry and trespass by the defendant Hulme, but contended that she was not responsible for the fraudulent pretence of Hulme that he was a bailiff from the police court with a warrant authorizing him to eject the plaintiff, nor for the other indignities and trespasses committed by him for which, as he contended, the defendant Hulme alone was answerable. The county court judge accepted this contention and gave judgment for 20*l*. against the defendant Mrs. Barrett and for 50*l*. against the defendant Hulme.

After judgment was given the plaintiff's solicitor in the absence of the defendants asked for leave to amend the particulars of claim by claiming 70*l*. against both defendants instead of 50*l*. on the ground that as the particulars stood the damages could not be apportioned between the defendants. The county court judge replied that he had given his judgment and could not alter it, but that he was willing to make any amendment that was legal or possible to put the matter right if he had made a mistake in apportioning the damages, and he asked the parties to draw up minutes of his judgment.

The parties could not agree as to how the damages should be apportioned or whether they should be apportioned at all. On March 10 the matter came again before the county court judge. The plaintiff's solicitor cited *Janvier v. Sweeney* (1) and contended that the defendants were in law equally responsible for all and each of the trespasses committed,

and that the county court judge in assessing the damages separately had misdirected himself in point of law, and he applied for a new trial. The county court judge held that he had misdirected himself in accepting the argument for the defendant Mrs. Barrett and in apportioning the damages, and ordered a new trial. On appeal by the defendant Mrs. Barrett from this order the Divisional Court (Shearman and Salter JJ.) reversed the order and affirmed the original judgment of the county court, but gave the plaintiff leave to appeal.

The plaintiff appealed.

H. H. Joy for the appellant. The Divisional Court came to the wrong conclusion. *Clarke v. West Ham Corporation* (1), which the Court professed to follow, is not applicable to the facts of this case. There a county court judge, having allowed a case to go to the jury and having given judgment in accordance with their verdict for the plaintiff, was asked to grant a new trial on the ground that there was no evidence to go to the jury. But if there was no evidence to go to the jury there must have been judgment for the defendants and not a new trial, so that the judge was really invited to reverse his own judgment. This he has no power to do : *Robinson v. Fawcett*. (2) In the present case the county court judge was not asked and could not properly be asked to reverse his judgment. He has made a mistake in assessing the damages separately in an action against joint tortfeasors : *Greenlands v. Wilmshurst* (3) ; *London Association v. Greenlands*. (4) But the correction of that error does not involve entering judgment for the respondent. A new assessment of damages is necessary before the rights of the parties can be finally ascertained. This case falls within the principle of *Sanatorium Ltd. v. Marshall*. (5) If a county court judge misdirects himself or a jury so that the judgment or verdict cannot stand, and if a new trial is necessary in order to decide

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(1) [1914] 2 K. B. 448.

(3) [1913] 3 K. B. 507.

(2) [1901] 2 K. B. 325.

(4) [1916] 2 A. C. 15.

(5) [1916] 2 K. B. 57.

C. A. the questions at issue, the county court judge has power to
1920 order a new trial.

ASTOR C. M. Pitman for the respondent. In *Sanatorium, Ltd. v.*
v. *Marshall* (1) the misdirection was upon a matter of fact.
BARRETT. Here it was upon a matter of law. Therefore that case is not
in point. A county court judge who has put to himself a
question of law and answered it has no power to change his
mind. If the parties are not satisfied the proper course is to
appeal: *Clarke v. West Ham Corporation*. (2)

[ATKIN L.J. That depends upon the effect or result of
the judge's mistake.]

The judgments in the *West Ham Case* (3) go further than
that. The judgment of Shearman J. in the Court below
is specially relied on. It is well settled that a county court
judge cannot reverse his own judgment directly; it is absurd
to contend that he can do so indirectly by means of a new
trial.

Counsel for the appellant was not called upon in reply.

BANKES L.J. This is an appeal from a Divisional Court
raising the question whether a county court judge had
jurisdiction under s. 93 of the County Courts Act, 1888, to
order a new trial of an action tried before himself without a
jury. The appellant brought the action against two defendants,
the respondent and another, claiming damages for trespass.
The case came on for hearing in the county court on
January 28. The first defendant was represented by counsel;
the second appeared in person. Counsel for the first defendant
took the point that the judge had power to discriminate
between the two defendants and to award damages against them
severally, according as he thought each was morally to blame.
Unfortunately he persuaded the judge, who awarded 20l.
against the first defendant and 50l. against the second. It is
to be regretted that having given judgment to that effect
the judge did not insist on greater regularity in the subsequent
proceedings. It seems that the appellant's solicitor approached

(1) [1916] 2 K. B. 57.

(2) [1914] 2 K. B. 448.

(3) [1914] 2 K. B. 451, 454.

the judge in the absence of the defendants and intimated to him that on the authority of a lately decided case he ought to have held the first defendant liable for all the acts of the second, and that the two were jointly liable for all that had been done. This was done without any improper motive, but I cannot let the event pass without saying that it is undesirable that one of the parties should apply to a judge to vary his judgment in any way without giving the other party an opportunity of resisting the application. As the result of this application the judge, being anxious to avoid further expense, expressed the view that he ought to have awarded one sum against both defendants, and tried to induce the parties to agree to a judgment on that footing. The parties could not agree, and they appeared before the judge on the second occasion on March 10. It was then pointed out to the judge that he had misdirected himself as to the separate assessments of damages. He then extended the time for applying for a new trial and, after some protest by the first defendant, granted a new trial. From this order the defendant Mrs. Barrett appealed to the Divisional Court.

On the hearing before that Court the attention of the learned judges, Shearman and Salter JJ., was called to *Clarke v. West Ham Corporation* (1) and *Sanatorium, Ltd. v. Marshall*. (2) Shearman J. considered this case governed by the *West Ham Case* (1) and allowed the appeal on the ground that the county court judge had no jurisdiction to order a new trial. Salter J. agreed with hesitation. He referred to *Sanatorium, Ltd. v. Marshall* (2), as though he approved of that decision and felt inclined to accept it as applicable.

I do not agree with the view of Shearman J. In my opinion those two cases are consistent. They are examples of two different classes. One class consists of those cases where the appropriate remedy for a misdirection is a new trial. Of that class *Sanatorium, Ltd. v. Marshall* (2) is an example. Assuming that there was in that case a misdirection in point of law, as to which I have some doubt, the proper remedy was a new trial, and it was rightly held that the county court

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(1) [1914] 2 K. B. 448.

(2) [1916] 2 K. B. 57.

C. A. had jurisdiction to order a new trial. The other class consists of those cases where the appropriate remedy for a misdirection is not a new trial but is to set aside a judgment given in favour of one party and to enter up judgment for the other party. Of that class the *West Ham Case* (1) is an example, where it was decided that the county court judge had no jurisdiction to order a new trial. That is the principle. The question of jurisdiction depends upon what is the appropriate remedy for the misdirection, and the two cases are not in conflict. The rules laid down by Sankey J. in *Sanatorium, Ltd. v. Marshall* (2) are quite correct. He said: "The result of the cases seems to be as follows: (1.) When a judge has made up his mind and given his decision, he cannot change his mind and reverse his decision merely because he is dissatisfied, or thinks better of it. There is no place of repentance for him. The authorities for this are (a) *Irving v. Askew* (3), where it is stated that a judge cannot change his mind; (b) *Brown v. Dean* (4), where it was held that a judge cannot grant a new trial in a case where he does not suggest that the former decision was wrong but considers that the case was one of the gravest doubt. (2.) The power to order a new trial must be exercised judicially, and the order can only be made on grounds which are in the High Court sufficient in law for making it: see *Murtagh v. Barry* (5) approved in *Brown v. Dean* (6) in the Court of Appeal and in the House of Lords. (3.) A county court judge, when he has once decided that there is a case to go to the jury, cannot grant a new trial upon the ground that there was no case to go to the jury, for the proper remedy in such circumstances is to enter judgment for the defendant, and that the judge has no power to do: see *Robinson v. Fawcett & Forth* (7) and *Clarke v. West Ham Corporation*. (1)" That passage only expresses in different language the distinction I have attempted to draw.

(1) [1914] 2 K. B. 448.

(2) [1916] 2 K. B. 57, 60.

(3) (1870) L. R. 5 Q. B. 208.

(4) [1910] A. C. 373.

(5) (1890) 24 Q. B. D. 632.

(6) [1909] 2 K. B. 573; [1910] A. C. 373.

(7) [1901] 2 K. B. 325.

To apply those principles to this case : the judge misdirected himself in point of law ; if judgment had been duly entered up and there had been no question of varying it, but one of the defendants had appealed, the Divisional Court as the Court of Appeal from the county court would certainly have ordered a new trial since that would be the appropriate remedy. Mr. Pitman argues that this is only a roundabout way of doing what cannot be done directly according to the decision in the *West Ham Case* (1) ; for that the inevitable result will be that the county court judge having granted a new trial will, after rehearing the case, vary his former judgment. But the possibility that the earlier judgment may be altered or even reversed is not a sufficient reason for limiting the jurisdiction to order a new trial. In my opinion the appeal succeeds.

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Banks L.J.

SCRUTTON L.J. The county court judge seems to have taken the view that he could deal with joint tortfeasors by assessing damages against each according to his moral iniquity ; therefore in an action against two who were principal and agent in committing a trespass he awarded 20*l.* damages against the principal and 50*l.* against the agent. What happened next is somewhat obscure ; it seems that the plaintiff's solicitor went to the registrar or the judge behind the backs of the other parties and pointed out that there were difficulties in the way of accepting judgment in that form. The judge sent notice that he would like to hear the parties as to the form of the judgment ; this was, I gather, after notice had been sent to tax the costs. When the parties attended to discuss the form of the judgment the judge said he thought he had made a mistake and proposed to order a new trial. The defendant's solicitor would not agree to any alteration in the form and so the judge made the order. The question is whether he had jurisdiction to do this. The Divisional Court took the view that they were bound by the *West Ham Case* (1), and held that the judge had no jurisdiction to make the order.

(1) [1914] 2 K. B. 448.

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Scrutton L.J.

Sect. 93 of the County Courts Act, 1888, gives the judge of a county court power in every case whatever, if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable. It was pointed out in *Lister v. Wood* (1) that these words are very wide, but in *Brown v. Dean* (2) it was held in the House of Lords that the general words do not give the judge an arbitrary discretion, but are to be restrained by the rules of law governing new trials. In the High Court, if it was proved that in an action against two joint tortfeasors the judge at the trial had assessed damages against each defendant and had then added these sums together and given judgment against them jointly for the total amount, it is clear that the Court of Appeal would not enter judgment either for the total amount or for either of the component sums. The Court would order a new trial in accordance with the rule of law which recognizes that there can be only one judgment in an action against joint tortfeasors. The county court judge has power to make the order which the Supreme Court would make when it is shown that the damages have been assessed upon a wrong principle. That rule was acted on in *Sanatorium, Ltd. v. Marshall*. (3) The judges in the Divisional Court considered that they were bound by the *West Ham Case*. (4) There it was held that a county court judge has no power to order a new trial because on further consideration he thinks he was wrong in the former trial in holding that there was evidence to go to the jury. If there was no evidence the remedy is not to order a new trial but to enter judgment for the defendant. Therefore, the *West Ham Case* (4) differs from this case on the facts. The principle on which this case ought to be decided is that if the High Court has power to order a new trial the county court has that power. As to the *West Ham Case* (4), when a case comes before this Court raising the same point upon the same facts it will be time to consider whether that case was rightly decided. As it is, the facts in this case differ so materially from those in the *West Ham Case* (4) that in my opinion the judges

(1) (1889) 23 Q. B. D. 229.

(2) [1910] A. C. 373.

(3) [1916] 2 K. B. 57.

(4) [1914] 2 K. B. 448.

in the Divisional Court were wrong in thinking they were bound by it.

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ATKIN L.J. I entirely agree with what has been said by Banke L.J. and should add nothing but for the fact that we are differing from a Divisional Court who relied upon a judgment to which I was a party. The County Courts Act, 1888, gives power to a county court judge to grant a new trial in the widest terms; but it is well settled that he can only grant it on grounds which justify the High Court in doing the same. He is limited to those grounds, but he can act on those grounds. If upon the facts in this case the defendant had applied to the High Court for a new trial that Court would certainly grant a new trial. It could not enter judgment and it could not assess the damages. It would have to say that the judge below had made a mistake and that the case must go back to him. Mr. Pitman argued that a county court judge has no power to grant a new trial if the ground of the application is that he has made a mistake in a conclusion of law; but that cannot be accepted as a general proposition. The matter may be tested in this way: Suppose there is admissible evidence on both sides and in addition to the admissible evidence the judge receives evidence which he ought not to have accepted; if he is afterwards satisfied that he has made this mistake, it seems to me he has ample jurisdiction to grant a new trial. Again, if he has made a mistake as to the proper measure of damages, he could correct that by saying that he had misdirected himself, and grant a new trial if a new trial is necessary in order to ascertain the true damages. But if the correction of the mistake of law is such that the High Court would not grant a new trial but would reverse the judgment, then there is no power in the county court to grant a new trial. If the plaintiff has obtained judgment in the county court through a mistake in law on the part of the judge, without which mistake the defendant ought to have succeeded, the county court judge has no power to correct that mistake, but must leave the defendant to his remedy by way of appeal. Take for example the case of a

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contract which is not enforceable for want of evidence in writing or which is void for illegality by statute or otherwise ; in these cases if a county court judge had given judgment for the plaintiff, it is not to be supposed that, having found out his mistake, the judge could order a new trial and put the parties to the expense of going through the evidence again with the only possible result that judgment must be entered for the defendant. In these cases the only remedy is by way of appeal. These were the views which the Court intended to express in the *West Ham Case*. (1) I thought the statement of them was reasonably clear. But be that as it may, there is no conflict between that case and *Sanatorium, Ld. v. Marshall*. (2) The judges in the latter case laid down the principles of law stated in the *West Ham Case* (1) and cited that case in support of them. The two cases are consistent, though there may be some doubt whether the principle on which *Sanatorium, Ld. v. Marshall* (2) is based was properly applied, and whether in that case judgment ought not to have been entered for the defendant. In the present case the judge, having come to a wrong conclusion on a matter which did not finally decide the rights of the parties, had power to order a new trial. The appeal must therefore be allowed.

Appeal allowed.

Solicitors for appellant: *Oldman, Cornwall & Co., for T. Wylie Kay, Blackpool.*

Solicitors for respondent: *Indermaur & Brown, for Callis & Woosnam, Blackpool.*

(1) [1914] 2 K. B. 448.

(2) [1916] 2 K. B. 57.

W. H. G.

[IN THE COURT OF CRIMINAL APPEAL.]

C. C. A.

THE KING v. LOVEGROVE.

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July 30

Criminal Law—Using Instruments with intent to procure Abortion—Evidence of similar user on another Woman—Admissibility.

The appellant was indicted for unlawfully killing, and for feloniously using certain instruments to procure the miscarriage of, a certain woman. At the trial evidence was given for the prosecution by the husband of the woman that, having obtained the appellant's name and address from another woman, he went to the appellant's house and arranged with her for his wife to go there in order that the appellant might perform an operation on her which would procure a miscarriage, and that his wife subsequently went to the appellant's house and afterwards had a miscarriage and died of septic abortion. The evidence of the other woman was tendered by the prosecution to show that the appellant had performed a similar operation on her some months previously. The evidence was objected to on the ground that the defence was a denial of the husband's evidence and that the appellant had never seen the deceased woman. The evidence was admitted, and the appellant was convicted :—

Held, that the evidence was rightly admitted, as it tended to corroborate the husband's evidence and was, therefore, relevant to an issue before the jury, and that the conviction must be upheld.

APPEAL against conviction.

The appellant, Annie Lovegrove, was tried at the Sussex Assizes on an indictment which charged that she, on June 25, 1920, did unlawfully kill Edith Emily Purcell, a married woman, and that on June 18, 1920, she feloniously used certain instruments to procure the miscarriage of Edith Emily Purcell.

The evidence for the prosecution showed that Mrs. Purcell was taken ill in the evening of June 18 and had a miscarriage. She was taken to a hospital on June 20, suffering from septic abortion, and she died in hospital on June 25. A post mortem examination disclosed an injury to the womb.

William Charles Purcell, the husband of Edith Emily Purcell, was called as a witness for the prosecution, and gave evidence to the following effect : In June, 1920, he discovered that his wife had been unfaithful to him and that she was pregnant. In consequence of a statement made to him

C. C. A. by a Mrs. Type he and his wife went to the appellant's house
1920 in Brighton in the morning of June 18. He asked the
appellant if she had brought about miscarriages even after
REX five months, and she said that she had, but that it was very
v. dangerous after four months. An appointment was made
LOVEGROVE. for his wife to see the appellant that evening. In the evening
he took his wife to the appellant's house and left her there.
After an interval of about an hour he returned to the house,
and took his wife away. She appeared to be suffering although
previously she had been in good health. In cross-examination
it was suggested to Purcell that he had gone to the appellant's
house merely for the purpose of looking for apartments, but
this he denied.

Mrs. Type was called as a witness for the prosecution.
Her evidence was objected to by counsel for the defence but
was admitted by Roche J. She said that in September, 1919,
being then pregnant, she went to the appellant's house on
two occasions and that the appellant performed an operation
on her as a result of which she subsequently had a miscarriage.
In June she had a conversation with Purcell and gave him
the appellant's address, which Purcell wrote down in her
presence on a piece of paper which was produced at the trial.

The appellant gave evidence. She said that Purcell, but
not his wife, came to her house in the morning of June 18 to
look for apartments and that on being told the terms for
her rooms he said he would think about it. Neither he nor
his wife came to her house that evening. She had never seen
Mrs. Purcell and had never performed any operation on her
or on Mrs. Type. The latter had been at her house on one
occasion; her object in coming was merely to borrow some
money.

The appellant was found guilty and was sentenced to
eighteen months' imprisonment with hard labour.

Doughty (Gentle with him) for the appellant. The evidence
of Mrs. Type was inadmissible. There was no issue raised
at the trial as to the nature of an operation which had been
performed, or as to the intention with which certain

instruments had been used. The defence was a complete denial of the allegations of the prosecution. The appellant's case was that Mrs. Purcell had never been to her house and that she had never performed any operation on Mrs. Purcell. Evidence to show that an accused person has performed other illegal operations is only admissible where the prosecution seeks to prove a system or course of conduct; or to rebut a suggestion of accident or mistake; or to prove knowledge by the prisoner of some fact: *Rex v. Bond*. (1) The present case does not fall within any of those categories. Mrs. Type's evidence had no relevance to the issue whether Mrs. Purcell went to the appellant's house on the day in question, and that was the only issue in the case. No doubt, her evidence tended to make the jury think that it was more probable that Purcell was telling the truth than the appellant, but that does not render the evidence admissible, for in every case evidence of a previous offence would have that effect.

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[It was also contended that the evidence of Purcell was that of an accomplice, and that there was no corroboration of his evidence.]

J. G. Hurst K.C. (*J. Flowers* with him) for the prosecution. Evidence is admissible if it is relevant to an issue before the jury, notwithstanding that it tends to show the commission of another offence or that the prisoner is of bad character. One issue in this case was as to the purpose for which Purcell went to the appellant's house in the morning of June 18, and as to what passed at his interview with the appellant. The evidence of Mrs. Type was relevant to that issue, for it corroborated the evidence of Purcell. It was, therefore, admissible.

[*Makin v. Attorney-General for New South Wales* (2), *Rex v. Ball* (3), *Rex v. Boyle* (4) and *Rex v. Shellaker* (5) were cited.]

Doughty replied.

(1) [1906] 2 K. B. 389, 414.

(3) [1911] A. C. 47.

(2) [1894] A. C. 57.

(4) [1914] 3 K. B. 339.

(5) [1914] 1 K. B. 414.

C. C. A. The judgment of the Court (Earl of Reading C.J., Salter
1920 and Acton JJ.) was delivered by :—

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LOVEGROVE. EARL OF READING C.J. who, after stating the facts, said :
The defence set up at the trial was that the appellant had not performed any operation, either lawful or unlawful, upon Mrs. Purcell, and that after her interview with Mr. Purcell on the morning of June 18 she never saw him again, and that she had never seen Mrs. Purcell on any occasion. The appellant gave a definite denial of the statements made by Purcell in his evidence as to what took place at the first interview, and therefore the truth or untruth of Purcell's account of that interview was put in issue. If Purcell's evidence was believed there could be no doubt as to the appellant's guilt, and indeed that was not disputed. It was therefore very important to ascertain what in fact took place at the first interview. Evidence is admissible if it tends to prove that the prisoner has committed the act charged. One step in proof of the act charged against the appellant was that Purcell went to her house one morning to arrange with her for her performance of an illegal operation on Purcell's wife, and that he went there in consequence of information which he had received from Mrs. Type. The evidence of Mrs. Type established that she had given the appellant's name and address to Purcell, and that a similar operation had been performed on her by the appellant in 1919. It is contended by counsel for the appellant that Mrs. Type's evidence was inadmissible on the principle laid down in *Makin's Case* (1), *Rex v. Bond* (2) and other cases. In the present case we are not intending to deal with the broad general principle that has been laid down in those cases, and nothing that is said in this judgment is intended to extend that principle. In *Makin's Case* (3) the Lord Chancellor said : "The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury." This Court has said, notably in *Rex v. Shellaker* (4) where the

(1) [1894] A. C. 57.

(2) [1906] 2 K. B. 389, 414.

(3) [1894] A. C. 65.

(4) [1914] 1 K. B. 414.

principle as stated by Channell J. in *Reg. v. Ollis* (1) was quoted, that the question in each case is whether on the facts the evidence is admissible according to the established principles of law. There may be cases where, as was said in *Rex v. Shellaker* (2), "though in strictness the evidence is admissible, the judge may be of opinion that it is of so little real value, and yet indirectly so prejudicial to the prisoner, or that it is so remote, that it ought not to be given. That, however, does not affect the general principle." We do not desire either to extend or to restrict the principle laid down in *Makin's Case* (3) and in other similar cases. But the present case does not depend on the principle there laid down. The evidence of Mrs. Type was admissible if it was relevant to an issue before the jury, and it was none the less admissible though it might prove that the appellant had committed a similar crime on a previous occasion. In our opinion Mrs. Type's evidence tended to prove that Purcell's account of what took place at the first interview was true, and that the appellant's version of the interview was untrue; it also tended to prove that Purcell did take his wife to the appellant's house in the evening of the same day for the purpose of having an illegal operation performed by the appellant.

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The evidence was, therefore, rightly admitted, and this ground of appeal fails.

[The Lord Chief Justice then dealt with the question whether there was any corroboration of Purcell's evidence, and came to the conclusion that there was corroboration.]

Appeal dismissed.

Solicitors for appellant: *C. R. Sawyer & Withall, for J. C. Buckwell, Brighton.*

Solicitors for the Crown: *J. K. Nye & Donne, Brighton.*

(1) [1900] 2 Q. B. 758, 781.

(2) [1914] 1 K. B. 418.

(3) [1894] A. C. 57.

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June 2.

A. W. WALKER & COMPANY v. COMMISSIONERS OF
INLAND REVENUE.

*Revenue—Excess Profits Duty—Profits of Trade or Business—Deductions—
Money borrowed for the Purpose of the Trade or Business—Interest—
Share of Profits—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 40,
Fourth Schedule, Part I., para. 2.*

A firm borrowed a sum of 4000*l.* for the purposes of its trade or business and in consideration thereof agreed to pay to the lenders the yearly sum of 200*l.* and, in addition, three-twentieths of the profits made by the firm each year in excess of 1000*l.* but not exceeding 3000*l.* The firm made 3000*l.* profits and accordingly paid the lenders in addition to the 200*l.* a further sum of 300*l.* :—

Held, that the 300*l.* was not interest on money borrowed for the purpose of the trade or business but was a distribution of a share of the profits, and that therefore in calculating the profits of the firm for the purpose of excess profits duty a deduction could not be allowed in respect of that sum.

CASE stated by the Commissioners for the General Purposes of the Income Tax Acts for the opinion of the High Court.

At a meeting of the General Commissioners of Income Tax for the division of Liverpool held on February 11, 1918, the appellants, Messrs. A. W. Walker & Co., who carried on business as corn merchants at 8, Brunswick Street, Liverpool, appealed against an assessment to excess profits duty of 1447*l.* 10*s.* in respect of the accounting period from October 1, 1915, to September 30, 1916.

In determining the profits upon which the assessment was based a sum of 200*l.* only had been allowed as a deduction instead of 500*l.* as claimed by the appellants in the circumstances hereinafter appearing. The appellants' ground of appeal was that the whole of the 500*l.* was interest on money borrowed for the purposes of the business, and therefore deductible in determining the profits for the purposes of excess profits duty as a necessary expense incurred by the firm in order to earn the profits in respect of which they were assessable.

The following were the facts of the case :—

Under the terms of an agreement dated October 1, 1914,

and made between Ellen Thorburn Walker and Robert Morland (thereinafter called "the lenders") of the one part and Arthur Reginald Walker and Thomas Elliot Scott Shore the partners constituting the appellant firm (thereinafter called "the borrowers") of the other part, the lenders, being the executors of the late Mr. A. W. Walker, lent to the appellant firm the sum of 4000*l.*, and in consideration thereof the firm agreed to pay to the executors the yearly sum of 200*l.* and three-twentieths of the profits made by the firm each year in excess of 1000*l.*, but not exceeding 3000*l.*

Clause 2 of the agreement provided: "The lenders shall, in respect to the period during which the said loan shall remain owing, receive in consideration therefor in the first place the sum of 200*l.* per annum, payable half yearly on the 31st day of March and the 30th day of September in every year, and further a three-twentieth part of the profits in excess of 1000*l.* per annum up to but not in respect of any profits exceeding 3000*l.* per annum, and the borrowers will punctually account to the lenders for and pay such share to them within 14 days after the 30th day of September in each year while the said loan shall remain owing."

Clause 4: "If the borrowers shall pay the interest and proportion of profits hereinbefore mentioned within 14 days after the several days on which the same shall fall due (as to which time shall be of the essence of the contract) and shall perform and observe all the agreements and stipulations herein contained and on their part to be performed and observed then and in such case the lenders will not take any steps whatsoever for enforcing payment of the said sum of 4000*l.* or any part thereof and (except by mutual agreement between the parties) the borrowers shall not be entitled to repay the said money to the lenders before the 30th day of September, 1921, any rule of equity to the contrary notwithstanding."

Then followed a proviso for repayment of the whole loan in the event of the death or bankruptcy, etc., of the borrowers.

Clause 5 was as follows: "This contract is not intended to

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give to the lenders any control of the said business of the borrowers but it is intended to be a contract within s. 2, sub-s. 3 (d), of the Partnership Act, 1890 (53 & 54 Vict. c. 39), and nothing herein contained or otherwise shall be deemed to create a partnership between the lenders or either of them and the borrowers or either of them."

In the accounts of the business of the borrowers for the year ending September 30, 1916, of the 500*l.*, 200*l.* was included in an interest and bank commission account, the debit balance of which was carried to the profit and loss account. The balance of the 500*l.*—i.e., 300*l.*—was entered as a separate item as a payment to Mrs. Walker in such profit and loss account.

It was argued on behalf of the appellants :—

(1.) That the whole sum payable to the lenders under the said agreement for the year in question—namely 500*l.*—was a trade expense necessarily incurred by the firm in order to earn their profits and ought to be allowed as a charge on the business.

(2.) That as excess profits duty was leviable only on the net profits of the business, the money paid for earning such profits should be deducted.

(3.) That the annual consideration payable to the lenders was "interest on money borrowed for the purpose of the trade or business" within the meaning of para. 2 of Part I. of the Fourth Schedule to the Finance (No. 2) Act, 1915, and was not a "distribution of profits" excepted from the right to deduction by the said paragraph.

(4.) That such excepted "distribution of profits" only related to the proprietors' (i.e., the actual partners') profits of the business, the payment in question being a payment necessarily made before such proprietors' profit was arrived at.

(5.) That the payment was interest within the legal definition of the word, reference being made to several dictionaries and to the observations of Farwell J. in the case of *Bond v. Barrow Hæmatite Steel Co.* (1)

Counsel also submitted that any ambiguity in expression

contained in the agreement ought not to be construed against the appellants inasmuch as the document had been prepared more than twelve months prior to the introduction of the Finance (No. 2) Act, 1915, and that unless the surveyor was prepared to impugn the entire arrangement under s. 44, sub-s. 3, of the Finance (No. 2) Act, 1915, then the document evidencing the arrangement must be admitted as a whole. In further support of the contentions of the appellants counsel referred to the definitions contained in s. 19, sub-s. 7, of the Finance Act, 1907, and to the following cases: *Thompson Brothers & Co. v. Amis* (1); *Farmer v. Scottish North American Trust* (2); *Mersey Docks and Harbour Board v. Lucas*. (3)

On behalf of the Commissioners of Inland Revenue it was contended (inter alia) that of the said sum of 500*l.* 200*l.* only should be deducted.

The Commissioners were of opinion that the contention of the surveyor of taxes was right and accordingly allowed as a deduction the 200*l.* fixed interest, but disallowed as interest the share of profits.

Disturnal K.C. and *Courthope Wilson K.C.* for the appellants. The whole of the 500*l.* ought to have been allowed as a deduction in determining the profits of the appellants' business for the purposes of excess profits duty. Under s. 40, sub-s. 1, of the Finance (No. 2) Act, 1915, the profits arising from any trade or business for the purposes of excess profits duty are to be determined upon the same principles as the profits or gains of the trade or business would be determined for the purposes of income tax subject to certain modifications set out in Part I. of the Fourth Schedule, under para. 2 of which deductions are allowed for interest on money borrowed for the purpose of the trade or business. It is clear from para. 5 of the schedule that deductions are allowed for the remuneration of directors, managers and persons concerned in the management of the trade or business, even though the remuneration depends on the profits of the trade or business. The share of

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(1) [1917] 2 Ch. 211, 214.

(2) [1912] A. C. 118.

(3) (1883) 8 App. Cas. 891.

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the profits given to the lenders was just as much remuneration for the loan as the fixed interest of 200*l.* was. It was interest although it was interest at a varying rate. The fact that it was a varying expenditure does not make any difference. It was part of the consideration paid by the borrowers for the loan. The words "not being . . . payments for the distribution of profits" in clause 2 of the schedule cut down the words that precede them, but they do not apply in the present case.

Sir Ernest Pollock S.-G. and *R. P. Hills* for the Commissioners.

ROWLATT J. I need not trouble you, Mr. Solicitor. It seems to me that this case is a very clear one.

The question raised is whether a sum of 300*l.* can be deducted in arriving at the profits for the purpose of excess profits duty. The 300*l.* together with another sum of 200*l.* is payable under the provisions of a contract whereby the appellants effected a loan of 4000*l.* for their business, and in consideration therefor they were to pay 200*l.* per annum half-yearly, that is interest at the rate of 5 per cent., and a further three-twentieths part of the profits in excess of 1000*l.* per annum up to but not exceeding 3000*l.* per annum. As the appellants made profits amounting to 3000*l.* they had to pay another 300*l.* The agreement also contains provisions to make it clear that this arrangement was not intended to be a partnership. For the purposes of the excess profits duty, the profits of a trade or business are, speaking generally, calculated on the same principles as they would be calculated for the purposes of income tax, but one exception is made, deductions being allowed in respect of interest on money borrowed for the purpose of the trade or business as provided in para. 2 of Part I. of the Fourth Schedule to the Finance (No. 2) Act, 1915. That paragraph says that "The principle of the Income Tax Acts under which deductions are not allowed for interest on money borrowed for the purpose of the trade or business, or for rent, or royalties, or for other payments income on which is collected at the source (not being payments of dividends or payments for the distribution of profits) . . .

shall not be followed." Therefore, it comes to this, that interest on money borrowed for the purposes of the trade or business is deductible but distribution of profits is not deductible.

I have come quite clearly to the conclusion that the decision of the Commissioners in this case is right. They have allowed as a deduction the 200*l.* a year which is the fixed interest on the money borrowed by the appellants for the purposes of their trade or business, but they have disallowed as a deduction the other sum of 300*l.* which seems to be nothing but a share of the profits of the business given to the lenders *eo nomine*. Of course both sums are paid as a consideration for the loan, that is why they are paid, but the two sums stand on entirely different footings. The persons who lent this money receive interest on the money lent which is payable to them as a debt, and for that purpose it is immaterial whether the business prospers or languishes, they also receive a share of what the business earns. That is not interest ; it is simply a share of the profits. If there are profits they receive a share of them, if there are no profits they do not receive anything. The sum of 300*l.* is simply what it is called in the agreement—a share of the profits.

Mr. Disturnal put the matter extremely clearly, and he relied on para. 5 of Part I. of the Fourth Schedule which certainly shows that a salary or a remuneration paid to a director or an official may be allowed as a deduction even though the amount depends upon the profits of the trade or business provided that the amount paid is not larger than it was in former days. There would be no point in saying it should not be larger if it were not deductible. Therefore that paragraph clearly shows that remuneration paid depending on the profits of the trade or business is deductible. But I do not think that this sum of 300*l.* comes within this provision ; it is not remuneration depending upon the profits of the business. The contract simply gives the lenders a share of the profits, without any of the rights or liabilities of partners ; it simply takes three-twentieths of the profits and gives it to the lenders and the borrowers take the other seventeen-

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1920 twentieths themselves. Under these circumstances I think
 A. W. the decision of the Commissioners was right and that the
 WALKER & appeal must be dismissed.
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 v.
 INLAND Solicitors for appellants: *Jaques & Co., for Layton, Son &*
 REVENUE *Calder, Liverpool.*
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 Rowlatt J. Solicitor for Crown: *Solicitor of Inland Revenue.*

R. F. S.

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BENSUSAN v. BUSTARD.

July 14, 15.

County Court—Costs—Action for Recovery of Possession of Dwelling House—Absence of alternative Accommodation—Refusal of Order for Possession—No Order as to Costs—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 113—Increase of Rent and Mortgage Interest (War Restrictions) Rules, 1916, r. 17 (1.)—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 5, sub-s. 1 (d).

By the County Courts Act, 1888, s. 113: "All the costs of any action or matter in the court, not herein otherwise provided for . . . in default of any special direction shall abide the event of the action or matter. . . ."

By the Increase of Rent and Mortgage Interest (War Restrictions) Rules, 1916, r. 17 (1.): "The costs of any application under the Act"—i.e., the Act of 1915—"and these rules shall be in the absolute discretion of the court."

By the Increase of Rent and Mortgage Interest (Restrictions) Rules, 1919, "the Act" is to be construed as referring to the Act of 1915 and the enactments amending and extending it.

The plaintiff brought an action in the county court to recover possession of a house which she had purchased for her own occupation and of which notwithstanding notice to quit duly served on the defendant, the tenant, the defendant refused to give the plaintiff possession. The county court judge refused to make an order for possession on the ground that upon the evidence he was not satisfied that alternative accommodation was available for the defendant within the meaning of s. 1, sub-s. 1 (c), of the Increase of Rent, &c. (Amendment), Act, 1919, and made no order as to costs. A bill of costs was served upon the plaintiff's solicitors, being the defendant's costs in the county court indorsed with a two days' notice of taxation before the Registrar.

Correspondence followed, which resulted in the Registrar sending to the plaintiff's solicitors a note made by the county court judge the material part of which was "I made no specific order as to costs, but I did not intend to deprive the defendant of any costs to which he might be entitled as the successful party." The costs were taxed and had since been paid:—

Held, that the Registrar had rightly taxed the costs, inasmuch as they were the costs of an action within the meaning of s. 113 of the County Courts Act, 1888, and were not governed by r. 17 (1.) of the Increase of Rent and Mortgage Interest (War Restrictions) Rules, 1916. They therefore followed the event, as the county court judge made no specific order as to them.

Where the defendant relies on the Rent Restriction Acts as a defence to an action for recovery of possession of premises, the judge should consider expressly the question of costs, and not leave them to fall automatically on one party.

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APPEAL by the plaintiff from a decision of the judge of the Brentford County Court.

The plaintiff (a widow) brought an action in the county court to recover possession of a house at Bedford Park which she purchased on May 22, 1919, for her own occupation, and of which, notwithstanding notice to the defendant to quit on June 24, 1919, served on the defendant by the vendor to the plaintiff on March 25, 1919, the defendant refused to give the plaintiff possession. After the date of the contract for purchase of the house, but before completion (which took place on May 22, 1919), the benefit of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, was extended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1919 (which came into operation on April 2, 1919), to houses of the category of the one in question, and at the adjourned hearing in the county court, which took place on April 30, 1920, the county court judge refused to make an order for possession on the ground that upon the evidence he was not satisfied that alternative accommodation was available for the defendant within the meaning of s. 1, sub-s. 1 (c), of the Increase of Rent, &c. (Amendment), Act, 1919, which came into operation on December 23, 1919, and is to be construed as one with the Act of 1915, and he made no order as to costs. It was not disputed that the county court judge had jurisdiction under the Increase of Rent, &c. (Amendment), Act, 1919, to refuse to make an order for possession.

After notice of appeal was served upon the defendant's solicitor, a bill of costs was served upon the plaintiff's solicitors, being the defendant's costs in the county court.

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This was indorsed with a two days' notice of taxation before the Registrar of the county court.

Correspondence followed between the plaintiff's and defendant's solicitors and the Registrar of the county court, which resulted in the Registrar sending to the plaintiff's solicitors a note made by the county court judge on May 12, 1920, the material part of which was: "I made no specific order as to costs, but I did not intend to deprive the defendant of any costs to which he might be entitled as the successful party." In view of this note, and being of opinion that time was too short to prohibit the taxation, the plaintiff's solicitors attended it. The costs were taxed and allowed at 11*l.* 12*s.* 10*d.* and had since been paid.

The plaintiff appealed upon the grounds that the county court judge in finding that there was no alternative accommodation, (1.) misdirected himself, (2.) did not exercise a judicial discretion, and (3.) "the learned judge, ten days after the aforesaid matter had been finally disposed of and determined by him, and without the appearance of either party before him, issued an intimation or direction to the registrar of his court (on which direction the registrar has acted) that, although he, the learned judge, had made no order as to costs at the hearing of the said matter, he had not intended to deprive the defendant of his costs, the learned judge being at the time he issued such intimation or direction *functus officio* and having no power or jurisdiction in that behalf."

Thorn Drury K.C. and *Morle* for the defendant. There is a preliminary objection to the hearing of this appeal upon the merits. The county court judge refused to make an order that the plaintiff was entitled to possession on the ground that he was not satisfied that there was alternative accommodation for the defendant within the meaning of s. 1, sub-s. 1 (a), of the Increase of Rent, &c. (Amendment), Act, 1919. Since the order of the county court judge was made the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), has come into force, and

s. 5, sub-s. 1, of that Act provides that : “ No order or judgment for the recovery or possession of any dwelling house to which this Act applies shall be made or given unless ” on one or other of certain conditions, the only one of which is material is “ (d) the dwelling house is reasonably required by the landlord for occupation as a residence and (except as otherwise provided by this sub-section) the Court is satisfied that alternative accommodation, reasonably equivalent as regards rent and suitability in all respects, is available.” The judge was not satisfied on the evidence before him that there was alternative accommodation. It cannot be said that there was no evidence in support of that conclusion or that if the case were sent back to him he would depart from it ; and having regard to the last-mentioned enactment, so long as that finding exists, no order for possession can be made.

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Disturnal K.C. and Picciotto for the plaintiff. It must be admitted that the plaintiff cannot succeed upon the merits. It would be useless to send the case back to the county court judge to reconsider his finding as to alternative accommodation, and, therefore, in view of the Act of 1920, an order for possession could not be made.

As regards costs, however, the plaintiff is entitled to succeed. The direction of the judge purporting to award costs to the defendant was irregular and invalid. It is true that under the Increase of Rent, &c. (War Restrictions), Rules, 1916, r. 17 (1.), the costs of any application under the Rent Restriction Acts and Rules are in the absolute discretion of the Court. In the present case the county court judge on April 30, 1920, without reserving the question of costs, disposed of the case on the merits and made no order as to costs. He therefore exercised his discretion as to costs by giving no costs. Under the County Courts Act, 1888, s. 93, that order was final and conclusive between the parties, as to all matters including costs. The judge had no power to rescind or alter it, even on the same day with the parties still before him : see *Annual County Courts Practice*, 1920, p. 98, and cases there cited. The only way in which the

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county court judge can alter his own order is by a substantive action brought for that purpose. He has no doubt an inherent jurisdiction to make a formal order accord with his real order; but in so doing he is merely carrying out his former order and not making a new one. The judge in giving the direction or intimation in his note dated May 12, 1920, that he "did not intend to deprive the defendant of any costs to which he might be entitled as the successful party," exceeded his jurisdiction, and that direction is void.

The Registrar treated the note as an order to give the defendant his costs. *Sweetland v. Turkish Cigarette Co.* (1) is an authority showing that this appeal will lie. The defendant was not entitled to his costs. Although the action was commenced under the County Courts Act, 1888, the defendant applied for relief under r. 17 (1.) of the Increase of Rent and Mortgage Interest (War Restrictions) Rules, 1916, and the effect of making that application was that r. 17 (1.) applied to the proceedings and that the costs were in the discretion of the Court.

The result of the county court judge having granted relief under s. 1, sub-s. 1 (c), of the Increase of Rent, &c. (Amendment), Act, 1919, is that s. 113 of the County Courts Act, 1888, under which costs follow the event does not apply to the present case as the costs of this action are "otherwise provided for" within the meaning of that section. The power to grant relief is a very special power given to a judge to deal with the matter otherwise than according to strict law.

The decision of the county court judge that he would make no order did not preclude a further application by the plaintiff for judgment for possession if the circumstances altered and there was subsequently alternative accommodation available. It must be admitted that if the costs are not within r. 17 (1.) they follow the event under s. 113 of the County Courts Act, 1888. The special jurisdiction under the Emergency Acts and Rules is superimposed on the general common law. The Court has a discretion under that special jurisdiction to deal with the costs in each case. Although

(1) (1899) 47 W. R. 511.

the Emergency Rules do not repeal s. 113 of the County Courts Act, 1888, the special jurisdiction given to the Court is superimposed on that conferred on the county court judge by the County Courts Act, 1888. [Rule 19 of the Increase of Rent and Mortgage Interest (War Restrictions) Rules, 1916, was also referred to.]

Thorn Drury K.C. in reply. Rule 17 (1.) of the Increase of Rent and Mortgage Interest (War Restrictions) Rules, 1916, relates only to specific matters arising under the Act of 1915 and leaves the costs of the action to be determined in the ordinary way under s. 113 of the County Courts Act, 1888. The costs abide the event unless the judge specially directs otherwise. The defendant was therefore entitled to costs as the judge gave no special direction.

A. T. LAWRENCE J. This appeal has become ineffective owing to the passing of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, on July 2 last. Mr. Disturnal admitted that the plaintiff had no longer an appeal from the substantive decision of the county court judge refusing to the plaintiff an order for the recovery of possession of the premises owing to the operation of that Act; but he contended that the plaintiff has a subsidiary right of appeal from the order in respect of costs made by the county court judge. That order for costs arose in a peculiar way. At the hearing of the plaintiff's claim for recovery of possession the judge declined to make an order for possession because he was not satisfied on the question of alternative accommodation, and he made no specific order as to costs. At a later date the Registrar, apparently having made a communication to the county court judge and the judge having said that he did not intend to deprive the defendant of any costs to which he was entitled, the Registrar entered in the book of the Court the order for costs against the plaintiff, and these costs were taxed and subsequently paid by the plaintiff. It is against the order so entered by the Registrar that the plaintiff appeals. It appears to me that the appeal must fail. It is based on the suggestion that this

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matter does not come within s. 113 of the County Courts Act, 1888, but is an application which must be determined specially under the rules made for the administration of the Rent Restrictions Acts. I do not think that is an accurate statement of the position. On behalf of the plaintiff Mr. Disturnal says, in substance, that the application was wholly made under the Rent Restrictions Acts; but that is not the case, though it is quite true that the substance of the defence was the provisions of those Acts, and it was those Acts which enabled the defendant to defeat the plaintiff's claim in the action. Rule 17 (1.) of the Rent and Mortgage Interest (War Restrictions) Rules, 1916, provides that "(1.) The costs of any application under the Act and these Rules shall be in the absolute discretion of the Court." "(2.) The Court may either fix the amount of such costs, or allow them on the scale applicable to an interlocutory application in an action" in respect of the different kinds of questions which arise under the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915. But these words do not seem to me to apply. They do not purport to repeal s. 113 of the County Courts Act, 1888; and there is no power by rules to repeal s. 113 of that Act. The rule applies to applications under the Act, and there are a number of applications which can be made under the Act with reference to questions of rent and mortgages, and a variety of things which are well covered by the words "any application under the Act and these rules." It is not necessary, in order to give them their full effect, to read them as though they affected s. 113 of the County Courts Act, 1888; and therefore I am unable to hold that s. 113 of the County Courts Act, 1888, has been affected by them. It seems to me that r. 19 shows a fortiori that this order as to costs was not made under the Rent Restrictions Acts, because r. 19 imposes on the judge the duty in dealing with the ordinary action for possession to see that the Rent Restrictions Acts "have been satisfied" and only to give possession then. There is therefore a statutory enactment in s. 113 of the County Courts Act, 1888, authorizing the Registrar to d^o

what he did. The Registrar was not acting improperly, and the letter of the county court judge to the Registrar saying that he did not intend to deprive the defendant of costs is explained by his having this section in his mind, and therefore saying that he did not intend to deprive the defendant of the costs to which he was entitled under that section. I think that the appeal fails and must be dismissed.

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MCCARDIE J. I agree. The plaintiff had given a notice to quit, and claimed possession as in an ordinary common law action of ejectment. The action came on for hearing, the judge made no order, and the plaintiff's action therefore failed. The proceedings in the county court were ejectment proceedings, in regard to which jurisdiction is, by the County Courts Act, 1888, given to the county court, and therefore the question of costs before the judge was governed by s. 113 of the County Courts Act, 1888, which provides that the costs of any action or matter in the Court, not therein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the Court shall think just, and in default of any special direction shall abide the event of the action or matter, and execution may issue for the recovery of any such costs in like manner as for any debt adjudged in the said Court. That section gives the judge the fullest power to direct that one side or the other shall pay the costs or to apportion them as justice shall dictate. The plaintiff having failed, the defendant thereupon is entitled to costs under s. 113 in default of any special direction of the judge. Mr. Disturnal has, on behalf of the plaintiff, presented many points, but in substance he suggests that inasmuch as the defendant succeeded in the action by virtue of the Rent Restrictions Act, 1915, and s. 1 of the Amendment Act of 1919, he fell within the special jurisdiction as to costs of r. 17 (1.) made under the former Act. In my opinion r. 17 has nothing to do with the matter which was before the learned judge. The Act of 1915 introduced a new and unique jurisdiction with regard to the relation of landlord and tenant. It created a particular statutory position, and enabled the

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tenant to apply to the High Court or county court in order that he might obtain relief to the extent and in the manner provided by the statute and rules made by the Lord Chancellor under the Act, and each one of those rules deals with a particular form of application for relief. It provides for the form in which it is to be made, and the like matters ; and it is in regard to those independent applications in the county court which were undealt with by the county court rules that this particular r. 17 was made by the Lord Chancellor. Such a rule had to be made because these applications were outside and beyond the former jurisdiction of the county court. The result of these considerations is that the order of the Registrar was in accordance with s. 113.

I only desire to add one observation as to the considerations which arise in regard to the claim for possession in the county court. It is true that a tenant presents a quasi-statutory defence and that this defence involves consideration of the rights of the tenant under the Rent Restrictions Acts. The plaintiff may fail as much owing to the hardship on the defendant as from the lack of merits on the part of the plaintiff. In each case I think the county court judge should consider expressly the question of costs and not leave them to fall automatically on one party. It is not wise to make no order as to costs. It ought to be made clear why costs are imposed on the party who fails, and why a particular order as to costs should be made. In every case the matter should be considered and the discretion as to costs should be distinctly exercised and an expression of the decision as to them should be made. I agree that this appeal should be dismissed.

A. T. LAWRENCE J. I express my concurrence in what my brother has said in regard to the exercise of the discretion as to costs by the county court judge.

Solicitors for plaintiff : *Montagu, Mileham, Solomon & Myer.*
Solicitor for defendant : *Charles Robinson.*

J. E. A.

LEAMAN v. THE KING.

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July 22, 23.

Army—Private Soldier—Contract with the Crown—Legal Right to pay.

The rule that all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown applies as well to private soldiers as to officers. A petition of right will not lie by a private soldier for his pay.

TRIAL of petition of right before Acton J.

The petition alleged that the suppliant, Frederick Leaman, enlisted as a private soldier in the mechanical transport section of the Royal Army Service Corps on September 15, 1914, on the terms and at the rate of pay then currently advertised in the newspapers—namely, at 6s. per day—and the period of enlistment being for one year or the duration of the war. The suppliant received a paybook which showed the rate of pay and period of enlistment to be as above stated. Subsequently, in June, 1916, he was informed that he had in fact enlisted as a “time serving soldier” for the period of seven years with the colours and five years with the reserve at the then current rate of pay—namely, 1s. per day—and that payment to him at any other rate had been in error. Early in 1917 he was informed that he had been overpaid to the extent of 120*l*. The suppliant’s pay was then reduced and he was compelled by deductions from his reduced rate of pay to make good the alleged debt of 120*l*., the whole of which sum he thereby repaid. In January, 1920, he was discharged from the Army. The suppliant prayed for payment of his pay at the rate of 6s. per day from the date when it was stopped. To that petition the Attorney-General demurred on the ground that it did not disclose any right of the suppliant to any sum of money, salary, pay or allowance, or any claim of the suppliant otherwise than upon His Majesty’s bounty. The Attorney-General also put in an answer and plea, wherein he stated that the terms of the suppliant’s enlistment and attestation were that he should serve for a period of seven years and five years with the reserve at the rate of 1s. 2*d*. per day with an additional 1s. per day corps pay. The entry

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in the suppliant's paybook of pay at the rate of 6s. per day was made in ignorance of the terms of his enlistment. The suppliant received pay at the rate of 6s. per day from September 16, 1914, to April 5, 1916, and the difference between that rate and the correct rate of 2s. 2d. per day was deducted by instalments from the suppliant's pay for subsequent periods; but upon his discharge in January, 1920, the whole deductions were repaid to the suppliant.

Merriman K.C. and *O'Hagan* for the suppliant.

Sir Ernest Pollock S.-G. and *G. A. H. Branson* for the Crown proposed to deal first with the demurrer before going into the facts alleged in the answer. It has been laid down over and over again by the Court of Appeal that servants of the Crown, whether civil or military, have no enforceable contract, but hold their offices only during the pleasure of the Crown: *Dunn v. The Queen*. (1) In *Mitchell v. The Queen* (2) Lord Esher said that it was clear law that "all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract." There the petitioner was an officer and not, as here, a private soldier, but that makes no difference. Lord Esher's language was perfectly general. There is here no jurisdiction to go into the matters alleged, which cannot be the subject of a petition of right.

Merriman K.C. and *O'Hagan*. The decision in *Mitchell v. The Queen* (2) followed the old cases, which undoubtedly decided that a military officer had no contract with the Crown which he could enforce. Those cases did not deal with private soldiers. But whatever may have been the position of private soldiers in that respect before 1879 it was established in that year by the Army Discipline and Regulation Act (1879) (42 & 43 Vict. c. 33), s. 77, that a private soldier does upon enlistment enter into a contract with the Crown: "Every person authorized to enlist recruits . . . shall give to every person offering to enlist a notice . . . stating . . . the general

(1) [1896] 1 Q. B. 116.

(2) (1890) [1896] 1 Q. B. 121n.

conditions of the contract to be entered into by the recruit." That Act has been repealed, but the provisions of s. 77 were re-enacted in s. 80, sub-s. 1, of the Army Act, 1881 (44 & 45 Vict. c. 58), which is the Act by which the position of the soldier is now regulated. By s. 190 of that Act an "officer" is distinguished from a "soldier," which latter term is defined not to include a commissioned officer.

In the Manual of Military Law, chap. x., para. 18, p. 189, it is stated that: "The enlistment of the soldier is a species of contract between the Sovereign and the soldier, and under the ordinary principles of law cannot be altered without the consent of both parties." He enlists for a definite term which can only be extended by his consent (s. 84), and on the expiry of his period of service he is entitled to his discharge (s. 90); whereas an officer may be called upon to serve for the period of his natural life and may be dismissed at a moment's notice. It is conceded that an officer cannot sue for his pay, but there is no provision in the Army Act negating the soldier's right to sue for pay. The only case which is apparently against this contention is *Smith v. Lord Advocate* (1), where it was held that an action against the Lord Advocate, as representing the War Department, brought by a man who had served as a bombardier in the Royal Artillery for his pay could not be supported in law. But that decision, as appeared from the judgment of the Lord Ordinary, was founded upon the old authorities, the fact of the law having been altered in 1879 being per incuriam overlooked. On the other hand in *Williams v. Howarth* (2), where a man entered into a contract with a Colonial Government as representing the Crown for military service in South Africa at a certain rate of pay, it was held that there was a binding contract by the Crown to pay that sum.

Sir Ernest Pollock S.-G. and *G. A. H. Branson* in reply. The expression "contract" in s. 80, sub-s. 1, of the Army Act is a loose expression which is not to be construed too literally. No reliance can be placed on that section, for there is just as much a contract with the officer as with the soldier. The

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(1) (1897) 25 R. 112.

(2) [1905] A. C. 551.

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officer is, on receiving his commission, just as much bound to serve as the soldier on attestation, and yet it is conceded that the officer has to look to the Crown's bounty for his pay. If there be a species of contract it is one in which the obligations are all on one side, and equally so in the case of both classes of men. It is analogous to an agreement between two subjects under seal that one shall serve the other without remuneration or for such pay as the other choose to give him. Such an agreement would be enforceable on one side and not on the other. Moreover, s. 80, sub-s. 1, speaks of "the contract to be entered into by the recruit." It says nothing about its being entered into by the Crown. Pay is payable under the Royal Warrant, and if there was a binding contract by the Crown to pay the agreed rate of pay the warrant could never be altered during the period of the contract without the soldier's consent.

Further, the Army Act is an annual Act, and the Crown could not enter into a contract for twelve years under an Act which lasts only for one. While s. 140, sub-s. 3, seems to show conclusively that there is no contractual right to pay, "In cases of doubt as to the proper issue of pay or the proper deduction from pay due to any officer or soldier, the pay may be withheld until His Majesty's order respecting it has been signified through a Secretary of State, which order shall be final." As to the authorities, the case is concluded by *Mitchell v. The Queen*. (1) *Williams v. Howarth* (2) does not support the suppliant's contention. All that was then decided was that the Colonial Government having entered into a contract with the soldier to pay him 10s. a day did so on behalf of the Crown, and that the soldier, having received pay at the rate of 4s. 6d. a day from the Imperial Government, was only entitled to the balance of 5s. 6d. from the Colonial Government, the 4s. 6d. having been paid on account of the 10s.

ACTON J. This was a claim by a soldier by way of petition of right for pay for military services rendered by him to

(1) [1896] 1 Q. B. 121n.

(2) [1905] A. C. 551.

the Crown. To that petition of right the Attorney-General demurred, alleging that it did not disclose any right of the suppliant to his pay or any claim in respect of it otherwise than upon His Majesty's bounty. In support of that demurrer the Solicitor-General relied upon what he described as a stream of authority adverse to the suppliant, and certainly no authority was referred to before me which directly supported any such claim as this by a soldier against the Crown. The first case to which the Solicitor-General referred was *Dunn v. The Queen*. (1) Lord Esher M.R. there quoted from his own judgment in *De Dohse v. The Queen* (2), which was decided in the Court of Appeal in June, 1885, and in the House of Lords in November, 1886, the passage quoted being in these words: "It is said that it was lawful to make such an engagement with him (the suppliant) for seven years, because the engagement offered and proposed was not an engagement of military service, it being admitted in argument that, if the engagement was for military service as a soldier, whether as officer or private, it is contrary to public policy that any such contract should be made." The Solicitor-General next referred to *Mitchell v. The Queen* (3), decided in 1890, and drew especial attention to the opening sentence of Lord Esher's judgment in which he said: "I agree with Mathew J. that the law is as clear as it can be, and that it has been laid down over and over again as the rule on this subject that all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract." Therefore it seems to me that, since Mr. Merriman is relying on the provisions of the Army Discipline and Regulation Act, 1879, and the Army Act, 1881, he is driven to say that the law as laid down in 1886 and 1890 and reaffirmed with emphasis in 1895, was not good law, at all events when applied to a soldier as distinguished from an officer. As I understand him he distinguished those cases on the ground that they were dealing with officers, whereas

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(1) [1896] 1 Q. B. 116, 118.

(2) Not reported.

(3) [1896] 1 Q. B. 121n, 122n.

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here we are dealing with a private soldier. But it is to be observed that Lord Esher's language is sufficiently comprehensive to cover both. It was contended on behalf of the suppliant that since 1879 a soldier, as distinguished from an officer, enters into a contract with the Crown, and Mr. Merriman began by referring to the definitions of "officer" and "soldier" respectively in s. 190 of the Army Act, and then proceeded to consider s. 80, sub-s. 1, of the Army Act, 1881 (which is a re-enactment of s. 77 of the Army Discipline and Regulation Act, 1879), and ss. 136 and 78. It is on those sections that his argument is founded. He also discussed a number of authorities. I do not think it necessary to deal with those authorities in detail, but there are two of them on which I think a word may usefully be said. One was *Williams v. Howarth* (1), which was relied on for the suppliant. It is to be observed that no question arose there as to the right of the soldier to enforce payment of pay for military services against the Crown in a Court of law. The money had been paid, and the question was whether the Colonial Government was entitled to the benefit of it in part discharge of its contract with the soldier. The other was *Smith v. Lord Advocate* (2), which Mr. Merriman admitted to be against him, but sought to explain away upon the ground that, although decided in 1897, it proceeded upon the old decisions before 1881. But there the soldier enlisted in 1851, and took his discharge from the Army in 1866, so that any argument founded on a supposed change of the law made by the Army Act, 1881, could have no application.

Mr. Merriman contended that although an officer does not enter into any contract with the Crown which he can enforce, it is otherwise with a soldier, but I think that contention fails. It may be that, as stated in the Manual of Military Law, at p. 189, "The enlistment of the soldier is a species of contract between the Sovereign and the soldier," but it by no means follows that it vests in the soldier the right to enforce by proceedings in a Court of law the payment of the sums to which he claims to be entitled in respect of his services. It was

(1) [1905] A. C. 551.

(2) 25 R. 112.

pointed out on behalf of the Crown that there was nothing repugnant to what is connoted in law by the word "contract" in such an interpretation being put upon the word. Illustrations were given of contracts which might be entered into between subjects, which would be enforceable on one side and not on the other. In my opinion the view put forward by the Solicitor-General of the relations between the Sovereign and the soldier is the correct one, and it would be impossible for me to hold otherwise without disregarding what has been in terms declared by authority binding on this Court to be the settled law on the subject, and has been so declared long after the Army Act became law. I hold, therefore, that the demurrer must be sustained.

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Judgment for the Crown.

Solicitor for the suppliant : *C. H. Heddon.*

Solicitor for the Crown : *Treasury Solicitor.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

FARR v. MOTOR TRADERS MUTUAL INSURANCE
SOCIETY, LIMITED.

1920
June 10.

[1919. F. 576.]

*Insurance (Accident)—Insurance of Motor Cab—Statement in Proposal—
To be driven in one Shift per 24 Hours—Incorporated in and made Basis
of Contract—Warranty or Description of Risk.*

The plaintiff was the owner of two taxi-cabs which he insured with the defendants in February, 1918, for one year against damage caused to either of them by accidental external means. In the proposal for the policy the plaintiff, in answer to a question, stated that each cab was to be driven in one shift per 24 hours. At the foot of the proposal form the plaintiff stated that the above statement was true, and the policy provided that the statements in the proposal were to be the basis of the contract and to be considered as incorporated therein. In August, 1918, while one of the cabs was undergoing repair, the other cab was driven in two shifts per 24 hours for a very short time, and from that time until the accident hereinafter mentioned happened the

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two cabs were driven in one shift only. In November, 1918, the cab which had been driven in two shifts in August was injured by an accident. It was at that time being driven in one shift only. In an action on the policy to recover in respect of the damage so caused, the defendants contended that the statement in the proposal that the cab was to be driven in one shift per 24 hours was a warranty, and upon breach thereof the insurance came to an end:—

Held, that the statement was not a warranty, but was merely descriptive of the risk, indicating that the cab, whilst being driven in more than one shift per 24 hours, would cease to be covered by the policy, but would be covered whilst being driven in one shift; and that the defendants were liable.

APPEAL from the judgment of Rowlatt J. at the trial of the action with a common jury.

The action was brought to recover a sum of money under a policy of insurance on a motor taxi-cab.

The plaintiff was the proprietor of two motor taxi-cabs in Belfast. On February 15, 1918, he signed a proposal for insuring the taxi-cabs with the defendants at a premium of 36*l.* a year. The proposal form contained the following (among other) questions, to which the plaintiff gave the answers herein stated: "State whether vehicles are used for public or private hire."—"Public." "Is the vehicle driven solely by the proposer?"—"No." "If not, state whether driven in one or more shifts per 24 hours."—"Just one." At the foot of the proposal form there was the following declaration: "I declare that all the above statements and particulars are true and complete and that I have not withheld any material information." Upon that proposal a policy, dated February 27, 1918, was issued, insuring the two taxi-cabs for one year against (so far as material to this case) any damage occasioned by accidental external means to any of the insured's motor vehicles described in the schedule thereto whilst being driven by the insured or by his licensed and duly authorized paid male driver. The policy contained a recital that the insured had made to the defendants "a written proposal and declaration containing certain particulars and statements which it is hereby agreed shall be the basis of this contract and be considered as incorporated herein." The policy was made subject to the conditions

indorsed thereon, one of which stated that the policy was granted on the express condition "that all statements made by the insured in the said proposal are true in every respect, and that if either this policy or any renewal hereof be obtained through any misrepresentation, suppression, concealment, or untrue averment whatsoever by or on behalf of the insured all claims hereunder shall be absolutely void and all premiums paid in respect hereof forfeited to" the defendants.

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Each taxi-cab had its own driver who was duly licensed, and who took it out for one shift each day. A shift lasted about 8 hours. On August 19, 1918, one of the taxi-cabs was being repaired, and when the driver of the other cab came in after having driven it for one shift, the other driver was allowed to take it out for a second shift so as to "earn a few shillings." The cab was driven for a short time in two shifts in August. From that time each cab was driven in one shift only. On November 7, 1918, an accident happened to the same taxi-cab (that is, the one which had been driven in two shifts in August) while being driven in one shift, and it was damaged to the extent of 121*l.* 4*s.* 6*d.*

The plaintiff brought this action to recover that sum from the defendants under the policy. (1) The defendants contended that as the statement in the proposal that the cab was only to be driven in one shift per 24 hours was made the basis of the contract, this averment having been broken the policy became void. No question was put to the jury in reference to this claim.

Rowlatt J. held that the effect of the statement in the proposal that the cab was only to be driven in one shift per 24 hours was that the defendants were only to be liable when the cab was being driven in one shift per 24 hours, and were not to be liable when the cab was being

(1) An accident happened to the cab when it was being driven in two shifts in August, and a claim was also made in this action in respect of that accident. The jury were asked whether running in two shifts in-

creased the risk, and they answered, Yes. Rowlatt J. gave judgment for the defendants on that claim, and it is unnecessary further to refer to it.

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driven in more than one shift ; that it was merely a limitation of the risk, and that the fact that the cab had been driven in two shifts in the previous August did not render the policy void. He accordingly gave judgment for the plaintiff for the sum claimed.

The defendants appealed.

Sylvain Mayer K.C. and *Merlin* for the defendants. The statement in the proposal that the taxi-cab was to be driven in one shift per 24 hours is a warranty, and having been broken when the cab was driven in two shifts per 24 hours in August, the policy on this taxi-cab became void. The statements in the proposal were incorporated in and made the basis of the contract in the policy, and by the condition indorsed on the policy the untrue averment made all claims thereunder absolutely void. The amount of the premium depends on the number of shifts in which the cab is run. One of the defendants' witnesses said that he would not insure a car run in two shifts. In *Thomson v. Weems* (1) Lord Blackburn said : "In policies of marine insurance I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever place, to be construed as a warranty, and, *prima facie*, at least that the compliance with that warranty is a condition precedent to the attaching of the risk. I think that on the balance of authority the general principles of insurance law apply to all insurances, whether marine, life, or fire." In *Dalglish v. Jarvie* (2) Rolfe B. said : "In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material, it is a fraud ; but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy." That exactly applies to the present

(1) (1884) 9 App. Cas. 671, 684.

(2) (1850) 2 Mac. & G. 231, 243.

case. If the plaintiff's contention is correct, the cab might be driven for thirty days in two shifts and for one day in one shift, and if it was damaged by an accident on that one day the plaintiff could recover. This seems an unreasonable construction of the policy. The defendants therefore are not liable.

[*Bean v. Stupart* (1) was also cited.]

J. G. Hurst K.C. and *Moritz* for the plaintiff were not called upon.

BANKES L.J. The question in this appeal relates to the construction of a contract of insurance into which the parties have entered. The assured answered certain questions in a proposal form, and those questions and the answers thereto were made the basis of the contract and were incorporated therein. The only question for decision by the learned judge, and by us, is whether the answer to one of the questions constitutes a warranty by the assured. If, as a matter of construction, it can properly be held that the question and answer amount to a warranty, then, however absurd it may appear, the parties have made a bargain to that effect, and if the warranty is broken, the policy comes to an end.

The position is very clearly and accurately put in *Macgillivray* on Insurance Law, p. 360, to which *Scrutton L.J.* has called my attention. In the section dealing with representations and warranties in fire policies he says: "It is a little doubtful how much is to be inferred from the mere description in a fire or burglary policy of the premises or goods insured. It may be put in three ways: (i.) that the description is a representation of the state of the premises or goods; (ii.) that the description is a definition of risk; (iii.) that the description is a warranty that the premises or goods shall correspond thereto." In this case the question which we have to decide is whether the particular statement in the proposal form is a definition of the risk or a warranty. Then he says: "But if the description is embodied in the policy"—

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which is the case here—"either actually or by reference, it has at least the force of a limitation of the risk to be run. In this view the premises or goods will be covered by the policy so long, but only so long, as they comply with the description, and if the description is considered merely, as a limitation of the risk and not a warranty the insurer will not be wholly discharged, but the policy will merely cease to attach until the property once more corresponds to the description." In the present case the proposal form contains the following: "Is the vehicle driven solely by the proposer?"—"No." "If not, state whether driven in one or more shifts per 24 hours."—"Just one." That was a true statement at the time it was made, and it remained a true description of the risk down to August. In that month one of the two taxi-cabs which the assured owned required some repairs, and it was sent away for that purpose. When it was away the assured gave the driver of that cab permission to take out the other cab, as the assured said, in order to earn a few shillings. As a consequence that taxi-cab was for a day or a little longer driven in more than one shift each 24 hours; but apparently that took place for a very short time. Then the practice of driving these two cabs separately by separate drivers in one shift per day each was resumed, and continued down to and including the date when the second accident happened.

The question is whether we are to construe the question and answer, as the defendants contend, as a warranty, the effect of which would be that in August, when the cab was driven in two shifts per day, the policy came to an end; or whether we are to construe them, as Rowlatt J. has construed them, as words descriptive of the risk, indicating that whilst the cab is driven in one shift per 24 hours the risk will be covered, but that if in any one day of 24 hours the cab is driven in more than one shift, the risk will no longer be covered and will cease to attach until the owner resumes the practice of driving the cab in one shift only. In my opinion, having regard to the nature of the question, it is impossible to construe the answer thereto as a warranty.

On these short grounds I think that the view taken by Rowlatt J. upon the construction of this contract is the correct one, and that the appeal fails.

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WARRINGTON and SCRUTTON L.JJ. agreed.

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Appeal dismissed.

Solicitors for plaintiff: *Robbins, Olivey & Lake.*

Solicitors for defendants: *Curtis & Co.*

W. F. B.

ATTORNEY-GENERAL v. PUBLIC TRUSTEE.

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July 27.

Revenue—Succession Duty—"Predecessor"—Marriage Settlement—Policy of Insurance on Life of Husband—Premiums paid by Third Party—Death of Husband—Settlement Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 2, 17.

In contemplation of a marriage it was agreed by the prospective parties and an uncle of the intended wife that the intended husband should effect a policy of insurance on his life in his own name and settle it as hereinafter mentioned, and that the uncle should pay the premiums during the joint lives of the husband and wife. The intended husband accordingly effected the policy, and the uncle paid the first annual premium. By the marriage settlement, which was made in 1853, the husband assigned the policy and the moneys payable thereunder to the trustees upon trust for himself until the marriage, and thereafter upon trust for the intended wife for life for her separate use, and after her death for the husband for life, and after the death of the survivor of them upon certain trusts for the children of the marriage, and, if there should be no child entitled, then after the death of the wife and such failure of issue for the husband absolutely; and the uncle thereby covenanted that if the marriage should take place he and his legal representatives would during the joint lives of the husband and wife pay the annual premiums; and the husband covenanted that, after the death of the wife if she died before him, as long as any child of the marriage or any person claiming under such child should be living, he would pay the premiums. The marriage took place shortly after the execution of the settlement. The husband died in 1917, survived by his wife and by issue of the marriage. All the premiums on the policy were paid by the uncle or his executors down to the death of the husband, when the policy moneys were paid to the defendant as trustee of the settlement on behalf of the beneficiaries. The Crown claimed that on the death of the husband succession duty became payable by the defendant in respect of

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the policy moneys as on a succession from the uncle, by virtue of the disposition made by the settlement :—

Held, that the interest in the policy moneys of the persons entitled under the settlement was derived from the uncle as “predecessor” within the meaning of s. 2 of the Settlement Duty Act, 1853, and that the defendant as trustee was liable to the Crown for the duty claimed.

Attorney-General v. Riall [1906] 2 I. R. 122 considered and distinguished.

INFORMATION by the Attorney-General.

In contemplation of a marriage then intended between the Rev. John Hart Davies, hereinafter called “the husband,” and Emilia Rachel Florence Beauclerk, hereinafter called “the wife,” an agreement was entered into that the wife should settle the sum of 1000*l.* belonging to her which was secured by a mortgage, and that the husband should effect a policy on his own life for 3000*l.* upon which he agreed to pay the premiums as they should become due, and should also effect a further policy on his life for 2000*l.* upon which Sir Montague John Cholmeley, Bart., the husband of an aunt of the wife, agreed to pay the first and all other premiums as they should become due during the joint lives of the husband and wife.

In pursuance of that agreement two policies on the life of the husband were effected in his name with the Clergy Mutual Assurance Society, both dated February 26, 1867, one of which was for 3000*l.* at the annual premium of 6*l.* 1*s.*, and the other of which was for 2000*l.* at the annual premium of 4*l.* 1*s.* 8*d.*

By an indenture of settlement, hereinafter called “the settlement,” dated April 23, 1867, and made between the husband of the first part, the wife of the second part, the said Sir Montague John Cholmeley (therein called Sir John Montague Cholmeley) of the third part, and the original trustees thereof of the fourth part, being the settlement made in pursuance of the said agreement and in contemplation of the marriage which was very shortly afterwards solemnized between the husband and the wife, reciting (inter alia) that the said sum of 1000*l.* and the security therefor had been assigned to the original trustees. It was witnessed that in pursuance of the said agreement and in consideration of the marriage it was

declared that the trustees of the settlement should hold that sum of 1000*l*. and the investments for the time being representing the same upon trust for the wife until the marriage and thereafter for the wife for life for her separate use without power of anticipation, and after her death for the husband if he should survive her during the remainder of his life, and after the death of the survivor of the husband and wife in trust for the children of the marriage as the husband and the wife should jointly appoint or in default of appointment as the survivor should by deed or will appoint, and in default of any such appointment in trust for all the children or any child of the marriage who being sons or a son should attain the age of 21 years or being daughters or a daughter should attain that age or marry, and if more than one in equal shares. And it was also witnessed that the husband thereby assigned to the original trustees the said two policies of assurance and all moneys bonuses and additions assured to become payable by or under the said policies and the full benefit thereof respectively and all the interest claims and demands of the husband in to or upon the same, together with power for the trustees in the name or names of the husband his executors or administrators or otherwise to demand sue for recover receive and give effectual discharges for the same moneys or any part thereof or interest for the same in trust for the husband his executors and administrators until the marriage, and thereafter upon trust to repay with interest at the rate of 5 per cent. per annum all sums of money which the trustees should have paid and advanced for keeping on foot the said policies or any of them and which should then be due and owing to them. And subject thereto upon the trusts and with and subject to the powers provisoes agreements and declarations thereinbefore declared and contained concerning the said sum of 1000*l*. and the stocks and securities in or upon which the same might be invested, and the income thereof, respectively, or as near thereto as the deaths of parties and the difference in the nature of the trust premises and other circumstances would admit, save and except that if there should be no child of the marriage who being a son should

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attain the age of 21 years or being a daughter should attain that age or marry then subject and without prejudice to the trusts aforesaid so far as applicable and after the death of the wife and such default or failure of children as aforesaid, the trustees should stand possessed of the said trust premises and the income thereof or so much thereof respectively as should not have become vested or been applied under any of the trusts or powers therein contained in trust for the husband his executors administrators and assigns. And the said Sir M. J. Cholmeley in pursuance of the said agreement in that behalf did thereby for himself and his heirs executors and administrators covenant with the original trustees their executors administrators and assigns that if the intended marriage should take place he the said Sir M. J. Cholmeley his heirs executors and administrators would during the joint lives of the husband and the wife duly and punctually pay the annual premiums and other sums necessary for keeping on foot the said policy of assurance for 2000*l.* or any policy or policies that might be effected in substitution therefor or for restoring the same respectively if the same respectively should have become voidable. And the husband did thereby for himself his heirs executors and administrators covenant with the original trustees their executors administrators and assigns that if the marriage should take place he would not do or suffer anything whereby the said policies or either of them might become void or voidable, and that he would duly pay the annual premiums and other sums necessary for keeping on foot the said policy for 3000*l.* or any policy effected in substitution therefor. And also after the death of the wife in the event of her dying before him so long as any child of the marriage or any person claiming through or under such child should be living would duly pay the annual premiums and other sums necessary for keeping on foot the policy for 2000*l.* or any policy effected in substitution therefor, or for restoring the same respectively if the same respectively should have become voidable, and in case either of the said policies for 3000*l.* or 2000*l.* respectively should become void either during the life of the wife or after

her death so long as a child of the marriage or any person claiming under any such child should be living would effect a new policy or policies with the said office.

Sir M. J. Cholmeley died on January 18, 1874, having paid the first premium and all other premiums which became due and payable on the policy for 2000*l.* down to the date of his death.

By an indenture dated June 27, 1904, new trustees were appointed of the settlement in the place of the original trustees who were then both deceased, and it was declared that all chattels and things in action subject to the trusts of the settlement should forthwith vest in the new trustees.

By an indenture dated September 22, 1916, the Public Trustee, the present defendant, was appointed trustee of the settlement in place of the said new trustees who were thereby discharged from the trusts thereof, and it was declared that the said two policies and the sums respectively assured thereby and all moneys to become payable thereunder and the right to recover the same, and also another policy on the life of the husband which had become subject to the settlement, and all other property then subject to the trusts of the settlement should vest in the defendant upon the trusts and subject to the powers and provisions of the settlement or otherwise.

The husband died on May 27, 1917, leaving the wife and issue of the marriage him surviving.

All the premiums on the policy for 2000*l.* were duly paid after the death of Sir M. J. Cholmeley by his executors down to the death of the husband, and on the death of the husband the sum of 3941*l.* was paid to the defendant under or in respect of the policy for 2000*l.*

The Crown claimed that on the death of the husband succession duty (1) became payable by the defendant in respect of the said sum of 3941*l.*, as on a succession from Sir M. J. Cholmeley by virtue of the disposition made by the settlement. (1)

The Commissioners of Inland Revenue applied to the defendant for payment of the succession duty (1) alleged to

(1) In the case of a succession arising on or after April 30, 1909,

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have become so payable, but the defendant refused to pay the same.

The Attorney-General on behalf of the Crown filed an information against the defendant, in which, after setting forth the facts substantially as above stated, the informant prayed (inter alia) as follows :—

1. That it might be declared that on the death of the husband succession duty became payable in respect of the moneys secured by and paid under or in respect of the said policy for 2000*l.* with all bonuses and additions thereto as a succession from Sir M. J. Cholmeley by virtue of the disposition thereof made by the settlement, and that the defendant as trustee of the settlement was personally accountable to the Crown for that duty.

2. That an account might be directed to ascertain the amount of the succession duty so payable together with interest at 3 per cent. per annum from the time when the same became payable, and that the defendant might be ordered to pay the amount of the duty and interest to the Commissioners, the informant waiving such penalties as the defendant might have incurred.

The informant filed and served interrogatories for the examination of the defendant.

The defendant in his answer denied none of the facts stated in the information, and admitted most of them ; alleged that the claim of the Crown raised questions of law and of the construction of the settlement and of the Succession Duty Act,

succession duty is payable as follows—

Where the successor is the lineal issue or lineal ancestor, or the husband or wife of the predecessor, the duty is 1 per cent. ; but in many cases it is not levied, and in some cases there is an additional duty of $\frac{1}{2}$ per cent. ;

Where the successor is a brother or sister, or a descendant of a brother or sister of the predecessor, the duty is 5 per cent., and in

some cases there is an additional duty of $1\frac{1}{2}$ per cent. ;

Where the successor is a more remote collateral relative of, or a stranger to, the predecessor, the duty is 10 per cent., and in some cases there is an additional $1\frac{1}{2}$ per cent.

See Succession Duty Act, 1853, s. 10 ; Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21 ; and Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58.

1853 (1), and that the defendant submitted these questions to the Court; and further stated that he had refused to pay the duty claimed and contended that the said sum was not payable.

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Sir Gordon Hewart A.-G. and Sheldon for the Crown.

On the death of the husband succession duty became payable in respect of the policy for 2000*l.* as on a succession from Sir M. J. Cholmeley under the marriage settlement, for which the defendant as trustee of the settlement is liable to the Crown.

Sir M. J. Cholmeley was the "predecessor" within the meaning of s. 2 of the Succession Duty Act, 1853 (1), to whom the defendant and those whom he represents succeed. That term is defined in the section as meaning the "settlor . . . or other person from whom the interest of the successor is or shall be derived." In construing these words regard should be had not to matters of form, but of substance: per Lord Davey in *Northumberland (Duke) v. Attorney-General*. (2)

In the present case by arrangement between the intended husband and wife and Sir M. J. Cholmeley, who was an uncle of the intended wife, a policy was to be taken out by the husband on his life in his own name and settled upon the wife and the children of the marriage, and the premiums were to be paid by Sir M. J. Cholmeley; and in pursuance of that arrangement the husband took out the policy, Sir M. J. Cholmeley paid the first premium, the intended settlement was duly executed, and the marriage was solemnized, and Sir M. J. Cholmeley has ever since paid the premiums. In

(1) The Succession Duty Act, 1853, provides:—

Sect. 2: ". . . the term 'predecessor' shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

Sect. 17: "No policy of insurance on the life of any person shall create the relation of predecessor and suc-

cessor between the insurers and the assured, or between the insurers and any assignee of the assured . . . ; but any disposition or devolution of the moneys payable under such policy . . . if otherwise such as in itself to create a succession within the provisions of this Act, shall be deemed to confer a succession."

(2) [1905] A. C. 406, 416.

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these circumstances, although the policy was taken out by the husband in his own name, yet from the time when it was taken out down to the date of the settlement it was held by him on a constructive trust in favour of Sir M. J. Cholmeley. During that period the policy was in equity and in substance the property of Sir M. J. Cholmeley, and if he had desired to do so he could have repented of his undertaking to keep it up and recovered back the first premium. On the execution of the settlement the equitable interest in the policy passed from Sir M. J. Cholmeley to the trustees of the settlement, and he was then in effect the settlor of the policy. The husband cannot be regarded as the "predecessor" from whom the policy was derived, because he contributed nothing towards the payment of a single premium. Even if the husband was a predecessor, Sir M. J. Cholmeley was also a predecessor, because he helped to create and maintained the policy by paying the premiums. Sect. 13 of the Act recognizes that a succession may be derived from more predecessors than one. During the whole period of the husband's life the policy was, at least in equity, the property of Sir M. J. Cholmeley or his executors, who paid all the premiums. The settled property to which the defendant succeeds is not the mere policy, but is the insurance money which became payable on the death of the husband, the whole of which represents money paid by Sir M. J. Cholmeley.

The case of *Attorney-General v. Riall* (1) is distinguishable, for there the husband himself paid the first premium, and the policy therefore at once became his property and could have been surrendered or assigned by him, and it never became the property of the third party who merely joined in assigning a fund in which she was interested to the trustees of the marriage settlement upon trust out of the income to pay the subsequent premiums on the policy.

Barrington-Ward K.C. and *W. J. Whittaker* for the defendant.

Succession duty did not become payable on the death of the husband in respect of the policy for 2000*l.* as on

(1) [1906] 2 I. R. 122.

a succession to Sir M. J. Cholmeley under the marriage settlement.

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The property which is the subject-matter of the succession in question is the policy or the money payable under it, and is not the aggregate of the premiums paid in respect of it: see Succession Duty Act, 1853, s. 17. (1)

The "predecessor" within the meaning of s. 2 (1) of the Act, from whom the interest in the policy was derived by the defendant, was the husband, and was not Sir M. J. Cholmeley. In the definition of that term given in that section the general words "other person from whom the interest of the successor is . . . derived," must be construed as ejusdem generis with the particular words which precede them—"settlor, disponent, testator, obligor, ancestor," each of which implies some act or connection in law effecting a transfer of property on a death, and creates the relationship of predecessor and successor. It also appears from s. 17 (1) that as regards policy moneys a succession is to be to the person making a disposition of them, or from whom their devolution is to be traced.

In this case the husband was the person who made the disposition of the property in the policy. He brought the policy into existence by entering into the contract with the insurance company. From the time when the policy was taken out down to the date of the settlement he was the legal and equitable owner of it. If he had died after the policy was taken out and before the settlement was executed, the policy would have passed to his executors. It was the husband who by the settlement assigned the legal and equitable interest in the policy to the trustees.

It is true that by a collateral bargain Sir M. J. Cholmeley became bound to pay the premiums upon the policy, and that he in fact paid them, and that by thus dedicating and supplying certain money to the purposes of the policy he materially assisted the husband to take out the policy. He did not, however, thereby become its creator, or its owner, or its assignor or settlor. If the husband had refused to allow

(1) See note (1), ante, p. 681.*

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Sir M. J. Cholmeley to continue to pay the premiums and had himself paid them, Sir M. J. Cholmeley could not have objected. The fact that Sir M. J. Cholmeley paid the premiums did not give him any interest in or right to claim the policy : it gave him at most the right to sue for money lent.

As Sir M. J. Cholmeley had no insurable interest in the life of the husband he was prohibited by the Life Insurance Act, 1774 (14 Geo. 3, c. 48), s. 1, from making the policy in question, or from acquiring any legal interest in it. It is submitted that there could not have been a resulting trust of the policy in favour of Sir M. J. Cholmeley, inasmuch as such a trust would have defeated the intention of the last-mentioned Act.

• The present case is covered by *Attorney-General v. Riall* (1), which shows conclusively that in a case of this kind the “predecessor,” from whom the interest in the policy of the parties entitled under the marriage settlement is derived, is not the third party paying the premiums on the policy, but is the husband in whose name it is taken out and who assigns it to the trustees of the settlement.

ROWLATT J. In this case a certain policy of insurance on the life of the Rev. J. Hart Davies, which had been effected by him in contemplation of his approaching marriage, and on which the first premium had been paid by Sir M. J. Cholmeley, an uncle of the intended wife, was, by the marriage settlement, assigned upon the trusts therein declared in favour of the husband, wife and children of the marriage, and all the subsequent premiums on the policy have been paid by the uncle or his executors ; and, the husband having died, the question is whether the trustee of the settlement on behalf of the beneficiaries takes the policy moneys from the husband or from the uncle as “predecessor” within the meaning of s. 2 of the Settlement Duty Act, 1853. That section enacts : “the term ‘predecessor’ shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.” I apprehend

that where the subject-matter to which the successor becomes entitled is of a permanent and pre-existing kind such as land or funds, the words "from whom the interest of the successor is or shall be derived" point to the person whose property it was before the settlement was made under which the interest of the successor arises, and who brought it into settlement. In the present case the subject-matter with which we are dealing is a policy of life insurance, which only comes into existence when it is taken out, and the value of which is reckoned on a calculation of the time that will elapse and the premiums that will be paid before the death happens, and is always fixed, subject to any profit that may be declared upon the policy. In spite, however, of the fact that a policy of insurance is a subject-matter of a peculiar nature, if it can be found that it belonged to some person before the settlement, and that he settled it, I take it that without doubt that person would be the "predecessor" contemplated by the section.

It has been argued on behalf of the Crown that Sir M. J. Cholmeley was the person whose property this policy was before the settlement, and who in effect settled it, inasmuch as he paid the first premium upon the policy before the settlement was made, and all the subsequent premiums.

On the other hand it has been argued on behalf of the defendant, that Mr. J. Hart Davies, the husband, was the person to whom the policy belonged and who brought it into settlement, inasmuch as he personally made the contract with the insurance company, and the policy was effected in his name, and formally assigned by him to the trustees of the settlement.

I think that it is quite clear that in cases of this kind one ought to look at the substance and not merely at the form of the transaction. One has to find out the person from whom the property really comes into the settlement; and the machinery by which, or the name under which, it is passed into, or through the course of, the settlement makes no difference.

The contention on behalf of the Crown—namely, that the policy was the property of Sir M. J. Cholmeley, because he paid

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the first premium—appears to me to be attended by several difficulties. One of these is that it implies that Sir M. J. Cholmeley must have enjoyed, at least for the first period of its existence, an insurance upon a life in which he had no insurable interest. Another is that this policy was created not only by the money of Sir M. J. Cholmeley, which paid the premiums, but also by the acts of the husband in making the application for the policy and attending to be examined in respect of it. Nor do I think that the contention on behalf of the defendant, that the policy was the property of the husband before the settlement, is free from objection. If it was his property, then, supposing that he had died before the execution of the settlement, his executors would have taken the policy moneys simply as being property which he himself had provided without having derived it from any predecessor. I suppose, indeed, that the defendant would have to go even further and maintain that immediately after Sir M. J. Cholmeley had paid the first premium on the taking out of the policy, the husband would have been entitled to go to the office of the insurance company, and, with or without consideration, to surrender the policy, or to assign it to another person. He could only be entitled to do that on the theory that he had received a gift of the first premium from Sir M. J. Cholmeley. It does not appear, however, that he did receive a gift of the first premium, or that, if he had immediately surrendered or assigned the policy, Sir M. J. Cholmeley could not have recovered back the amount of the first premium, not perhaps as money paid on a consideration which had failed, because the consideration had not failed, but at all events as money lent.

The true position appears to me to be this : Mr. Hart Davies applied for the policy and was examined with reference to it, but he only did so upon the footing that Sir M. J. Cholmeley was going to pay the premium; and Sir M. J. Cholmeley paid the premium, but he only did so upon the footing that Mr. Hart Davies had taken the policy out in his own name and was going to settle it for the benefit of his wife and the children of the marriage. It therefore seems to me that this

policy never had a moment's existence as the free property of either of these gentlemen. Moreover the object for which the policy was brought into existence by the co-operation of these two persons was that it might be included in the marriage settlement, and whoever could legally deal with it as a matter of form, it was subject to a trust to go into that settlement. If, after the policy had been effected, the settlement had been made, but the marriage had not taken place owing to the previous death of either party, or from some other cause, the policy would no doubt have passed to the intended husband or his executors, but it would have so passed under the trusts of the settlement, and not by virtue of its being his independent property. If the settlement had never been made by reason, for example, of the previous death of the intended husband, the policy moneys would have gone to his executors, but that result would have followed because it would have been necessary to deal with these moneys as if the settlement had been made, and not because the policy had belonged absolutely to the intended husband. And if the settlement had never been made, not because of the death of the intended husband, but because the marriage went off, it may be that in that case, as in the last-mentioned case, the husband would have got the policy, or it may be that Sir M. J. Cholmeley would have had the right to claim it. In no case, however, do I think that the policy after it was taken out and before the settlement was executed, would have been the free property of either party, because the difficulty of accepting either view appears to me to be insurmountable. I therefore think that I ought to regard the policy in question as having been created for the purpose of the marriage settlement *codem instanti* with the settlement, and as a thing which had no existence antecedent to the settlement. That is what it is in substance, and it is to its substantial nature that I ought to look.

In these circumstances I have to find out who is the "predecessor" from whom the policy has been derived by the persons entitled to it under the settlement. I have come to the conclusion that I ought to hold that the policy has been

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derived from Sir M. J. Cholmeley. The essential fact is that the value of the policy is due to the money which he put into it, the amount having been based beforehand upon the prospect of life of the person insured. The policy moneys correspond to the premiums paid by him during the time of the insured's life. In short, if I may so express it, the whole financial source of the policy and of the policy moneys was in this case Sir M. J. Cholmeley.

On behalf of the defendant the Irish case of *Attorney-General v. Riall* (1) has been pressed upon my attention, but it seems to me that that case is entirely distinguishable from the present. If I rightly understand the facts of that case, I fail to see how it could have been decided otherwise than it was decided. There, in contemplation of a marriage, the intended husband took out a policy of insurance upon his own life and paid the first premium. A month later he assigned the policy to the trustees of the marriage settlement, under the provisions of which the subsequent premiums were to be paid out of funds provided by another person. In these circumstances the husband was treated as the settlor of the policy, the payment of the subsequent premiums out of the other funds merely being taken to imply a dedication of these funds to that purpose ; and it was therefore held that the person providing these funds was not the "predecessor" within the meaning of the section now in question. To my mind it seems obvious that in that case the husband, after he had taken out the policy and before the settlement was executed, had a perfectly free and unclouded title to that policy. He had taken it out, and he had paid for it. If he took it out under an arrangement with another person to provide for its subsequent maintenance, neither that person nor anybody else had so far done anything towards its maintenance. He had no doubt taken it out with the intention of settling it in order that the subsequent premiums should be paid out of money to be provided under the settlement, but in no sense was it as yet subject to that arrangement, and if before the settlement was executed he had changed his

intention and surrendered the policy, or sold it, or given it away, and taken out another policy in another office, nobody could have said him nay on legal or even on honourable grounds. Down to the date of the settlement the policy was his policy, and its destination towards the settlement rested in his bare intention, which might have changed and led him to deal with it in some other way; and no other person had any interest in the policy or in calling for it to be so dealt with. The fact that in that case, until the settlement was executed, the policy was the independent property of the prospective husband affords, I think, ample ground for distinguishing that case from this.

I give judgment in favour of the Attorney-General in the terms of the first two paragraphs of the prayer in the information with costs.

Judgment for informant.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for defendant: *Rooper & Whately.*

J. R.

GIBAUD *v.* GREAT EASTERN RAILWAY COMPANY.

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Railway—Cloak-room—Deposit of Article—Ticket—Condition protecting Railway Company—Condition, whether binding—Reasonableness—Questions for Jury—Negligence of Official—Article left at Door of Cloak-room.

July 19, 30.

A condition in a railway cloak-room ticket purporting to exempt the railway company from responsibility for articles above a specified value deposited in the cloak-room except on certain terms, and assented to by the person taking the ticket, is not prevented from being part of the contract and from protecting the company merely because it is unreasonable, provided that it be not so extravagant as to imply, and there is no other evidence to show, that that person's assent to it has been obtained by fraud, or so irrelevant as to be foreign to the contract.

The plaintiff took his bicycle to the cloak-room at a station of the defendant company for the purpose of depositing it there, paid to the official the charge demanded, and received a ticket purporting to be a cloak-room ticket upon the face of which was legibly printed the following condition: "The company will not be in any way responsible in respect of any article deposited the value whereof exceeds 5*l.* unless at

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the time of deposit the true value and nature of the article shall have been declared, and 1*d.* per 1*l.* sterling of the declared value be paid for each day or part of a day in addition to the ordinary cloak-room charges." The value of the bicycle exceeded 5*l.*, but the plaintiff made no declaration of value or additional payment. The bicycle was standing at the open door of the cloak-room, but the official told the plaintiff to leave it there as he would put it away. When the plaintiff returned to claim the bicycle it could not be found. In an action by the plaintiff against the defendants for the value of the bicycle the defendants relied upon the above condition. It was found in effect that the plaintiff knew that there was printing on the ticket, that he believed it contained a condition, and that the defendants had done sufficient to give the plaintiff notice of the condition; and it was not found and there was no evidence to show that the plaintiff's assent to the condition had been obtained by fraud. It was further found that owing to the negligence of the official in leaving the bicycle at the door of the cloak-room it had been stolen. The judge held that the condition was unreasonable, and gave judgment for the plaintiff. On appeal to the Divisional Court:—

Held (1.), that, assuming that the condition was unreasonable (which, semble, it was not), the defendants were not, merely on that ground, prevented from relying upon it, inasmuch as it was not so extravagant as to imply that the plaintiff's assent to it had been obtained by fraud, or so irrelevant as to be foreign to the contract.

Dictum of Bramwell L.J. in *Parker v. South Eastern Ry. Co.* (1877) 2 C. P. D. 416, 428, and dictum of Byles J. in *Van Toll v. South Eastern Ry. Co.* (1862) 12 C. B. N. S. 75, 88 considered and explained. Dictum of Cave J. in *Pratt v. South Eastern Ry. Co.* [1897] 1 Q. B. 718, 720 approved and adopted.

(2.) That the defendants were protected by the condition, although the bicycle had not been deposited within the cloak-room.

Harris v. Great Western Ry. Co. (1876) 1 Q. B. D. 515 followed.

(3.) That on the above facts and findings judgment should be entered for the defendants.

APPEAL from the City of London Court.

On September 2, 1919, the plaintiff, J. G. Gibaud, took his bicycle to the station of the defendants, the Great Eastern Railway Co., at Enfield, for the purpose of depositing it in the cloak-room. He went to the cloak-room, which was also the booking office, and told a clerk in attendance that he wanted to leave the bicycle. The clerk said that the charge would be 4*d.*, and filled up a ticket or receipt for the bicycle. The plaintiff handed 4*d.* to the clerk, and the clerk handed the ticket to the plaintiff. The bicycle was then at the open door of the cloak-room or booking office, partly in that apartment and partly in the public booking hall. The plaintiff

asked the clerk if he should bring it into the cloak-room, but the clerk told him to leave it there and he would put it away. The plaintiff then left the bicycle with the clerk and went away.

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The ticket consisted of a printed form in which the particulars of the contract in question were inserted in writing. On the face of the ticket there were filled in in writing the name of the station, the date, and the name of the depositor. There was then the printed statement: "Received the undermentioned, to be delivered to the person presenting this ticket," followed by a printed list of the articles more usually deposited with spaces opposite them for the charges made—in this instance the space opposite the article "bicycle" having the charge "4d." inserted in it in writing. Then came the following condition printed in legible characters: "The company will not be in any way responsible in respect of any article deposited the value whereof exceeds 5l. unless at the time of deposit the true value and nature of the article shall have been declared, and 1d. per 1l. sterling of the declared value be paid for each day or part of a day in addition to the ordinary cloak-room charges." Lastly, there was the printed statement: "For further conditions and scale of charges see back of this ticket." On the back of the ticket there was printed matter only consisting of the heading "Conditions upon which articles are accepted for deposit," followed by five numbered conditions. The first of these conditions consisted of a table showing the charges made for articles deposited according to their nature, weight, size and period of deposit; the second condition stated that the company would not be responsible for articles left by passengers at the station unless left in the cloak-room; and the third condition stated that depositors were not permitted access to articles deposited in the cloak-room for the purpose of securing a portion thereof.

On the following day, September 3, 1919, the plaintiff returned to the station and went to the cloak-room, where he presented the ticket to the clerk who was then on duty. Search was then made for the bicycle, but it could not be

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found in the cloak-room, or the bicycle-shed, or elsewhere at the station, and it had not since been heard of.

The plaintiff brought the present action against the defendants in the City of London Court claiming 15*l.* 15*s.* as the value of the bicycle, or, alternatively, 15*l.* damages for negligence.

The plaintiff in his examination-in-chief proved the facts above mentioned as to the deposit of the bicycle at the cloak-room and the issue of the ticket ; and he further stated that on receiving the ticket from the clerk at the cloak-room he put it in his pocket without reading it ; that the clerk did not call his attention to any notice on the ticket ; and that he did not know of any condition such as was printed on the face of the ticket, or of any reservation of the defendants' liability as to bicycles.

He stated in cross-examination that on former occasions he had left a bicycle at railway cloak-rooms, but not at any cloak-room of the defendants ; that on these occasions a ticket had always been handed to him, but he had not noticed more thereof than that it was a receipt for the bicycle ; that in the present case he noticed that there was printing on the ticket but did not read it ; and that he had had a copy of the defendants' time-book, but had not seen or read anything about this notice.

The judge in giving judgment said in substance that he drew the inference of fact that by reason of the lack of due care on the part of the defendants in allowing the bicycle to be left at the door of the cloak-room in the public booking hall it was stolen ; that in his view the condition in question ought not to protect the defendants, as they had not carried out their contract by depositing the bicycle in the cloak-room, but that *Harris v. Great Western Ry. Co.* (1) was an authority directly in conflict with that view, and that he was bound by that decision ; that it remained to consider the main question whether the defendants were relieved from liability for the loss of the bicycle by the condition on the face of the ticket ; that his interpretation of the condition was that it

(1) (1876) 1 Q. B. D. 515.

purported to relieve the defendants from all liability if the article exceeded 5*l.* in value, and not that their liability enured up to 5*l.*, although the value of the article exceeded that amount; that on the main question the leading authority was *Harris v. Great Western Ry. Co.* (1) where the principle was stated; that he thought the true test to 'apply' in this case was whether the person who received a cloak-room ticket on depositing an article in a railway company's cloak-room knew or might reasonably be taken to know that the ticket was more than a mere receipt for the article, and a voucher entitling him on presentation thereof to recover the article. Then, after referring to the plaintiff's evidence, the judge continued: "I am constrained, therefore, to the conclusion that the plaintiff knew the document was something more than a receipt for the bicycle; in other words that it was a contract setting forth the terms on which the company took the article into their charge. He did not, however, know what these terms and conditions were, but he is bound whether he read them or no, if he knew there were conditions, and his action in leaving the bicycle must, therefore, be treated as a representation to the defendants that he accepted the conditions." The judge then proceeded to say in effect that the plaintiff would not, however, be bound by conditions which were unreasonable: per Bramwell L.J. in *Parker v. South Eastern Ry. Co.* (2); that, as the condition in question on its true construction purported to relieve the defendants from all liability in respect of an article which exceeded 5*l.* in value, it was an unreasonable condition; that if the plaintiff had been informed of the condition he would have been bound by it whether reasonable or not, but that the constructive consent arising from the receipt by the plaintiff of a ticket which he knew contained conditions did not bind him to a condition which was unreasonable; and he was therefore of opinion that the condition in question did not avail the defendants, and he gave judgment for the plaintiff for 15*l.*

The defendants appealed.

(1) (1876) 1 Q. B. D. 515.

(2) (1877) 2 C. P. D. 416.

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Disturnal K.C. (Bruce Thomas with him) for the defendants, appellants. The defendants are protected from liability for the loss of the plaintiff's bicycle by the condition on the face of the cloak-room ticket.

All the facts necessary to subject the contract of deposit to the condition have been found. It is well settled what the facts are that must be found for that purpose. It is not necessary that the person receiving the ticket should read the condition or be acquainted with its terms: *Harris v. Great Western Ry. Co.* (1) It is only necessary that the following three facts be found: first, that the person receiving the ticket knew that there was writing or printing upon it; secondly, that he believed that the writing contained conditions relating to the contract; and, thirdly, that the person giving the ticket gave sufficient notice of the condition: per Mellish L.J. in *Parker v. South Eastern Ry. Co.* (2); *Richardson, Spence & Co. v. Rowntree* (3); and *Hood v. Anchor Line (Henderson Brothers), Ltd.* (4). In the present case the judge has found the first and second of these facts in express terms, and the third, if not in express terms, at least by implication. On these findings he should have given judgment for the defendants.

The judge was wrong in holding that the contract was not subject to the condition, because the condition was unreasonable. Even if the condition be unreasonable, that consideration is immaterial. There is no authority for the view that the condition must necessarily be reasonable either in fact or law. The observation of Bramwell L.J. in *Parker v. South Eastern Ry. Co.* (5), which is relied upon in the judgment under appeal, and the similar observation of Byles J. in *Van Toll v. South Eastern Ry. Co.* (6) were merely dicta, and in my case they were intended to refer only to conditions which were entirely irrelevant or extravagant. It appears from the observations of Erle C. J. in *Van Toll v. South*

(1) 1 Q. B. D. 515.

(2) 2 C. P. D. 416, 423.

(3) [1894] A. C. 217.

(4) [1918] A. C. 837.

(5) 2 C. P. D. 416, 428.

(6) 12 C. B. (N. S.) 75,
88.

Eastern Ry. Co. (1), and of Cave J. in *Pratt v. South Eastern Ry. Co.* (2), that the question of the reasonableness of the condition does not arise. If it be open to inquire whether or not the condition be reasonable, then it is submitted that it is not unreasonable: *Van Toll v. South Eastern Ry. Co.* (3); *Skipwith v. Great Western Ry. Co.* (4); and *Pratt v. South Eastern Ry. Co.* (5).

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On the facts as found by the judge the defendants are entitled to judgment. If these facts are insufficient to entitle the defendants to judgment, there should be a new trial.

Schwabe K.C. (R. Fortune with him) for the plaintiff, respondent. The defendants are not protected from liability by the condition.

On the facts as found by the judge the condition cannot be supported. In order to support the condition the three facts must be found which are specified in *Parker v. South Eastern Ry. Co.* (6) and *Richardson, Spence & Co. v. Rowntree* (7), to which attention has already been called—namely, that the person receiving the ticket knows there is writing upon it, that he believes that the writing contains conditions, and that he has had sufficient notice of the condition. Where all these facts have not been found the person receiving the ticket has been held not to be bound by the condition, as in *Henderson v. Stevenson* (8) and *Richardson, Spence & Co. v. Rowntree* (7); and, on the other hand, where all these facts have been found he has always been held bound, as in *Harris v. Great Western Ry. Co.* (9). In the present case the judge has not definitely found that the plaintiff believed that the ticket contained conditions, but only that, if he knew there were conditions he must be treated as having accepted them.

[SANKEY J. It would seem that as soon as the person receiving the ticket knows that there is printing upon it he ought to suspect that the printing contains conditions: *Acton v. Castle Mail Packets Co.* (10).]

(1) 12 C. B. (N. S.) 84, 85.

(2) [1897] 1 Q. B. 718, 720.

(3) 12 C. B. (N. S.) 75.

(4) (1888) 59 L. T. 520.

(5) [1897] 1 Q. B. 718.

(6) 2 C. P. D. 416.

(7) [1894] A. C. 217.

(8) (1875) L. R. 2 H. L. Sc. 470.

(9) 1 Q. B. D. 515.

(10) (1895) 73 L. T. 158.

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Nor is there here any finding that the defendants did what was sufficient to give the plaintiff notice of the condition.

In addition to the three facts already specified, there is also a fourth fact that must be found—namely, that the condition is reasonable: per Bramwell L.J. in *Parker v. South Eastern Ry. Co.* (1); per Byles J. in *Van Toll v. South Eastern Ry. Co.* (2); and see per Lord O'Hagan in *Henderson v. Stevenson.* (3) The decision in *Watkins v. Rymill* (4) plainly implies that in a case of this kind the condition must be reasonable. The question whether or not the condition is reasonable is one of fact. The condition here in question purports to exempt the defendants from all liability in respect of articles deposited with them of more than a certain value, and the judge has found that it is in the circumstances an unreasonable condition.

Moreover, there are facts in this case which disentitle the defendants to the protection of the condition. It appears from the ticket as a whole, and more particularly from clauses 2 and 3 on the back of it, that the contract is one by which the defendants undertook to deposit the bicycle in the cloak-room. The defendants' official did not deposit the bicycle in the cloak-room, but left it at the open door of the cloak-room partly in the public booking hall, and the judge has rightly drawn the inference that owing to the official's lack of care the bicycle was stolen. The defendants were not entitled to the benefit of the condition unless they performed their duty under the contract, and these facts show that they failed to do so. This case is distinguishable from *Harris v. Great Western Ry. Co.* (5), because there the contract was not to deposit the article in the cloak-room, but to warehouse the article. That case was wrongly decided, the true view being that of Lush J., the dissentient judge. Even if this Court regards itself as bound by that decision, the plaintiff desires to reserve this point in case of an appeal to the Court of Appeal.

(1) 2 C. P. D. 416, 428.

(2) 12 C. B. (N. S.) 75, 88.

(3) L. R. 2 H. L. Sc. 470, 481.

(4) (1883) 10 Q. B. D. 178.

(5) 1 Q. B. D. 515.

Bruce Thomas in reply. All the facts necessary to support the condition have been found. It is immaterial to consider whether the condition was reasonable. Even in the case of a contract of carriage, the parties may at common law insert any condition, and no question can be raised as to its reasonableness. It was because of that state of the law that it was provided by the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7, that conditions relieving a company to which the Act applies from liability for loss of or injury to articles carried by it must be reasonable. In the case of a contract of bailment, the parties may impose whatever terms they choose, and the reasonableness of a condition is an irrelevant inquiry : *Van Toll v. South Eastern Ry. Co.* (1)

There are here no circumstances which disentitle the defendants to the benefit of the condition. The fact that the bicycle was at the open door of the cloak-room, partly in the cloak-room and partly in the booking hall, did not render the condition inoperative. The contract did not require the defendants to keep the bicycle in the cloak-room. If it did, then the bicycle was partly in the cloak-room. On this point *Harris v. Great Western Ry. Co.* (2) is conclusive in the defendants' favour.

Cur. adv. vult.

July 30, 1920. The following judgments were read :—

BRAY J. This is an appeal from a decision of Judge Atherley Jones in the City of London Court on a claim by the plaintiff against the Great Eastern Railway Company for damages for the loss of a bicycle deposited by the plaintiff with them at one of their stations on September 2, 1919. The learned judge gave judgment for the plaintiff for 15*l.*, and the question he had to decide was whether the plaintiff was bound by the conditions appearing upon the ticket handed to the plaintiff when he deposited his bicycle with them. The learned judge held that he was so bound if those conditions were reasonable, but not so bound by any unreasonable condition, and that the condition on which the company relied was unreasonable.

(1) 12 C. B. (N. S.) 75.

(2) 1 Q. B. D. 515.

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This condition exempted the company from all liability if the value of the article deposited exceeded 5*l.*, unless he declared the value and nature of the article and made an additional payment of 1*d.* per 1*l.* value. The condition was in these terms: "The company will not be in any way responsible in respect of any article deposited the value whereof exceeds 5*l.*, unless at the time of deposit the true value and nature of the article shall have been declared, and 1*d.* per 1*l.* sterling of the declared value be paid for each day or part of a day in addition to the ordinary cloak-room charges. For further conditions and scale of charges see back of this ticket." It was printed on the face of the ticket in good-sized print. The learned judge held that inasmuch as it purported to protect the company against all liability, as it in fact did, and not only as against liability for the excess value beyond 5*l.*, it was unreasonable. Another point was raised before us which I will deal with later, but this was the main contention. As this raised a point which in terms had not been decided, we thought it right that we should reserve our judgment and state our reasons carefully and clearly.

There have been many cases dealing with tickets which have conditions printed on them. The leading case is *Parker v. South Eastern Ry. Co.* (1) That lays down quite clearly what are the facts to be determined in order to see whether the plaintiff, the person receiving the ticket, is bound, or whether the condition relied on by the defendants was part of the contract between them and the plaintiff. The law as laid down in this case by Mellish L.J. (2) has been approved of by the House of Lords. (See *Richardson, Spence & Co. v. Rowntree* (3); and *Hood v. Anchor Line (Henderson Brothers), Ltd.* (4). It has been acted upon ever since *Parker's Case*. (1) The Lord Justice states (2) what direction should be given to the jury, and in order to carry out that direction the practice has been to leave three questions to the jury. They are these: (1.) Did the person receiving the ticket see or know that there was writing on the ticket? (2.) If he knew there

(1) 2 C. P. D. 416.

(2) 2 C. P. D. 416, 423.

(3) [1894] A. C. 217.

(4) [1918] A. C. 837.

was writing on the ticket, did he know or believe that the writing contained conditions relating to the terms of the contract? (3.) Did the person giving the ticket do what was reasonably sufficient to give him notice of the conditions? In this case the plaintiff in his evidence admitted that the answer to the first question should be "Yes." As to the other two questions, counsel differed as to how they were answered by the learned judge, but I think on a perusal of the argument before the learned judge, and his judgment, it is fairly clear that he found both questions 2 and 3, or at all events question 2, in the defendants' favour. As to the third question, the only proper answer on the evidence would in my opinion be "Yes." The result of these findings therefore would be that the plaintiff was bound by the conditions in the absence of fraud. I say "in the absence of fraud," because Mellish L.J. guarded himself by using these words. (1) Baggallay L.J. agreed with Mellish L.J., but Bramwell L.J. differed on some points, and in dealing with the case of the condition being unreasonable, he says (2): "I think there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document . . . no condition not relevant to the matter in hand." This passage was relied upon by the learned county court judge as laying down the law that if the condition was unreasonable, the party receiving the ticket would not be bound. This was at most a dictum. There was a similar dictum by Byles J. in *Van Toll v. South Eastern Ry. Co.* (3), which was certainly not assented to by the other judges. I do not think, if the dictum of Bramwell L.J. is fairly read, it lays down the rule supposed by the learned county court judge. Possibly the dictum of Byles J. does. If they do, I am not bound by them and do not agree with them. Every contract is voidable by fraud, and if the condition is so irrelevant or extravagant that the party tendering the ticket must have known that the party receiving it could never have intended to be bound by such a condition, then I should say that the assent of the

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(1) 2 C. P. D. 421.

(2) 2 C. P. D. 428.

(3) 12 C. B. (N. S.) 75, 88.

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party receiving the ticket was obtained by fraud, and he would not be bound. The mere fact that the judge or the jury considered the condition unreasonable would not in my opinion be sufficient justification for a finding that the assent was obtained by fraud. If the learned county court judge is right, a fourth question must be asked in every case—namely, Were the conditions unreasonable? That has never been done, and in *Pratt v. South Eastern Ry. Co.* (1) Cave J. in the course of the argument says (2): “This is a common law contract of bailment, and the question of reasonableness does not arise; if it did, I should say the condition was reasonable.” In my opinion, once it is found that a party has expressly or by his conduct assented to the conditions, he is bound by these conditions just as much as if he had signed a written contract containing them, and it is no answer to say that they are unreasonable, unless he can prove that his assent has been obtained by fraud. In this case there was, in my opinion, no evidence of fraud. The condition which the learned judge has held to be unreasonable existed in *Parker’s Case* (3), and it would seem that in that case it was admitted that it was reasonable. Cave J. held that it was reasonable in *Pratt v. South Eastern Ry. Co.* (4) The same condition has existed in other cases. It has become a common condition, and it has never been held to be unreasonable. The fact that a parcel is valuable largely increases the risk of theft, and the railway companies not unnaturally refuse to undertake that risk without an additional payment.

In my opinion the learned county court judge was wrong in law in holding that the plaintiff was not bound because the condition was unreasonable.

A further point was raised in the county court that the bicycle was not put by the defendants’ servants into the cloak-room, but was left in the doorway only, without any protection, and was stolen owing to this negligence. This point, I gather, that the learned judge decided in the defendants’ favour. It was raised again before us, but in

(1) [1897] 1 Q. B. 718.

(2) *Ibid.* 720.

(3) 2 C. P. D. 416.

(4) [1897] 1 Q. B. 718, 720.

my opinion the learned judge decided this point rightly. I think the condition covered this risk.

The remaining point was whether our order should be for a new trial, or whether the defendants were entitled to judgment. I think the defendants are entitled to judgment on the facts as found by the learned judge.

This appeal must be allowed, and judgment entered for the defendants with costs here and below.

SANKEY J. This is an appeal by the defendant company against a judgment of a learned county court judge, whereby he awarded the plaintiff 15*l.* for the loss of his bicycle. The facts are as follows: The plaintiff took his bicycle to the defendants' station at Enfield for the purpose of depositing it in the cloak-room. He handed it to the official in charge, and, paying 4*d.*, was given a receipt upon the face of which the following condition was printed in legible characters: "The Company will not be in any way responsible in respect of any article deposited, the value whereof exceeds 5*l.*, unless at the time of deposit the true value and nature of the article shall have been declared, and 1*d.* per 1*l.* sterling of the declared value be paid for each day, or part of a day, in addition to the ordinary cloakroom charges." The value of the bicycle in fact exceeded 5*l.* The plaintiff said that he did not read the receipt, but the judge came to the conclusion that he "knew the document was something more than a receipt for the bicycle,—in other words, that it was a contract setting forth the terms on which the company took the article into their charge." He held, however, that although the plaintiff was bound by conditions which were reasonable, he was not bound by conditions which were unreasonable, and being of opinion that the said condition was unreasonable he decided that the plaintiff was not bound by it and gave him judgment for 15*l.*, as above stated. From that judgment the defendants appeal, and contend that they are relieved from responsibility by the condition in question.

Assuming the condition to be unreasonable, a proposition which is open to doubt, the question which falls for

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determination is whether under such circumstances a person in the position of the plaintiff is bound thereby. It will be observed that the plaintiff did not sign any document.

A large number of decisions have been given on the law to be applied in circumstances where a person is presumed to have accepted or entered into a contract by conduct, as for example by taking a receipt or ticket with conditions printed upon it. The leading judgment still is that of Mellish L.J. in *Parker v. South Eastern Ry. Co.* (1), which was approved by the House of Lords in *Richardson, Spence & Co. v. Rowntree.* (2) In the latter case a passenger on a steamboat had been handed a ticket with conditions on it, and it was laid down that the questions for the jury were: (1.) Did the plaintiff know that there was writing or printing on the ticket given to him? (2.) Did he know that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage? (3.) Did the company do what was reasonably sufficient to give him notice of the conditions? These three questions have undoubtedly been approved and asked in many cases, but it is suggested now that there ought to be a fourth—namely, “Was the condition a reasonable one?”

The foundation for the argument may be traced to some remarks made by Byles J. in *Van Toll v. South Eastern Ry. Co.* (3); by Bramwell L.J. in *Parker v. South Eastern Ry. Co.* (4); and by Stephen J. in *Watkins v. Rymill* (5), where that learned judge, after summing up the decisions and dealing with the exceptions, says as follows (6): “An exception has been suggested of conditions unreasonable in themselves or irrelevant to the main purpose of the contract. Lord Bramwell suggests some illustrations of this in his judgment in *Parker v. South Eastern Ry. Co.* (1) One is the case of a ticket having on it a condition that the goods deposited in a cloak-room should become the absolute property

(1) 2 C. P. D. 416.

(2) [1894] A. C. 217.

(3) 12 C. B. (N. S.) 75, 88.

(4) 2 C. P. D. 416, 428.

(5) 10 Q. B. D. 178.

(6) Ibid. 189.

of the railway if not removed in two days. We are aware of no absolute decision on this point, nor is it material to the present case." Now it will be seen that Stephen J. does not put the case higher than that an exception has been suggested of conditions unreasonable in themselves, and adds: "We are aware of no absolute decision on this point, nor is it material to the present case." In *Pratt v. South Eastern Ry. Co.* (1) the head-note reads: "A condition upon a cloak-room ticket issued by a railway company that they 'will not be responsible for any package exceeding the value of 10*l.*,' protects the company from liability, not only for the loss of an article deposited in the cloak-room, but also for damage or injury thereto while in their custody." Cave J. said in the course of the argument: "This is a common law contract of bailment, and the question of reasonableness does not arise." In my view that is a correct statement of the law, and the remarks of Byles J. and Bramwell L.J. above referred to have been misunderstood. There may be conditions on a receipt or ticket given under circumstances like the present and constituting a contract, which do not bind a person to whom it is given, but that is not because such conditions are unreasonable, but because they are so extravagant as to amount to fraud, or so irrelevant as to be entirely foreign to the contract which the parties are making. An instance of the first might be found in a case where the person handing such a receipt to the other party inserted in it a condition which no honest man would think of inserting and no ordinary man would dream of finding there; as for example that the article deposited should be forfeited if not reclaimed in five minutes. An instance of the second might be found where there was a condition quite foreign to such a contract; as for example that before the depositor was entitled to reclaim the article deposited he should become a shareholder in the company's undertaking. The first of these conditions would be a fraudulent and the second an irrelevant one, and neither would be binding.

No such considerations arise in the present case, and the

(1) [1897] 1 Q. B. 718, 720.

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mere fact that a judge considers one term of the contract made between the parties to be unreasonable does not entitle him to decide that it is not binding upon them.

I am of opinion, therefore, that the learned judge was wrong in holding that because he came to the conclusion that this condition was unreasonable the plaintiff was not bound by it, and as admittedly the bicycle was over the value of 5*l.* and the condition had not been complied with, the company were entitled to judgment.

The learned counsel who appeared for the respondent desired to keep open the point that as the bicycle was not actually placed in the cloak-room he was entitled to succeed. On that, I agree with the learned county court judge that he was bound by, and I think we ought to follow, the decision in *Harris v. Great Western Ry. Co.* (1), which holds the contrary.

In the result, the appeal must be allowed with costs.

Appeal allowed.

Solicitor for appellants : *Thomas Chew.*

Solicitors for respondent : *Henry Boustred & Son.*

(1) 1 Q. B. D. 515.

J. R.

END OF VOL. III.





